



**Self-Represented Litigants:
The Impact of the Family Law Duty Lawyer Scheme in Tasmania**

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Doctor of Philosophy

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Declarations

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The research associated with this thesis abides by all international and Australian codes on human and animal experimentation. Research conducted under this study received approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health and Medical Research Council.

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Abstract

A growing body of research has investigated the impact of self-representation on everyone involved in the family court system. The Family Law Duty Lawyer Scheme (the 'Scheme') was introduced in 2005 as one early intervention measure to minimise the adverse effects of self-representation. The Scheme was intended to enhance access to justice for self-represented litigants ('SRLs') and improve the efficient operation of the Family Courts.

The effectiveness of the Scheme has not been investigated. The objective of this research is to provide an understanding of how the Scheme operates in Tasmania, what benefit it provides, and whether it reduces the impact of self-representation by examining the Scheme in a practical setting. It takes an action research approach.

The researcher is in the unique position of working as the family law duty lawyer with the Legal Aid Commission of Tasmania ('LACT') in Hobart. She has collaborative arrangements with the small and cohesive legal profession in Tasmania, many of whom participated in the empirical study that was part of this investigation to provide their views and experiences of SRLs in the family law system. The study used both qualitative and quantitative methods involving interviews with judges and duty lawyers and surveys of SRLs, court staff and family law practitioners in Tasmania. It was anticipated that the research would result in changes being made to the delivery of the duty lawyer service by the researcher, in her role as duty lawyer.

The results of the surveys and interviews revealed a widespread acknowledgement of the benefits to the family law system when the duty lawyer assists SRLs before they file proceedings; that there is a need to raise awareness of the Scheme and provide information about what the duty lawyer can and cannot do; and that the duty lawyer service is highly valued and appreciated to the extent that there is a demand for duty lawyers to be available for more time outside the court lists, offering a wider range of services to SRLs.

This thesis develops a best practice model for Tasmania, and recommends reforms to the Scheme to increase and enhance duty lawyer services. The recommended initiatives may be applied in other jurisdictions wishing to adopt a model offering a duty lawyer service. The Scheme can evolve to be a more extensive and useful service by improving and expanding access to justice for SRLs.

Terminology and Abbreviations

2006 Amendments Reforms	<i>Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)</i>
ACE	Advice and Community Legal Education (Section of the Legal Aid Commission of Tasmania)
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
CCP	Children's Cases Program
CIJ	Centre for Innovative Justice
CLC	Community Legal Centre
CLE	Community Legal Education
CLS	Community Legal Service
CLC	Community Legal Centre
DIY	Do it Yourself
DL	Duty lawyer
EIU	Early Intervention Unit (Legal Aid New South Wales)
FCA	Family Court of Australia
FCC	Federal Circuit Court
FLA	Family Law Act 1975 (Cth)
FLC	Family Law Council
FLAP	Family Law Assistance Program (Australian Centre for Justice and Innovation, Faculty of Law, Monash University)
FLPAT	Family Law Practitioners Association of Tasmania
FLPN	Family Law Pathways Network: Greater Hobart
FMC	Federal Magistrates Court
FTE	Full Time Equivalent
HCLS	Hobart Community Legal Service
HREC (Tasmania)	Human Resources Ethics Committee (Tasmania)
ICL	Independent Children's Lawyer
ICCPR	International Covenant on Civil and Political Rights
Judge	All judicial officers, including judges of the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia
LAC	Legal Aid Commission

LACT	Legal Aid Commission of Tasmania
LAT	Less Adversarial Trial procedure, contained in Division 12A of the Family Law Act 1975 (Cth)
LANSW	Legal Aid New South Wales
LCLC	Launceston Community Legal Centre
LDL	Launceston Duty Lawyer
LiPs	Litigants in Person
LPC	Legal Practice Course
NLA	National Legal Aid
NPA	National Partnership Agreement on Legal Assistance Services
NSRLP	National Self-Represented Litigants Project
NWCLC	Northwest Community Legal Centre
Protocol	Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, Family Law Duty Lawyer Scheme National Protocol (2007)
PwC	PricewaterhouseCoopers
QPILCH	Queensland Public Interest Law Clearing House
SAC	Summary Advice Counsel (the term used for duty lawyers in the civil (family law jurisdiction) in Canada)
Scheme	Family Law Duty Lawyer Scheme
SRL	Self-represented litigant
SRS	Self-Representation Services
VicLA	Victoria Legal Aid

Definitions

Persons who lack legal representation in the Family Court of Australia ('FCA') and Federal Circuit Court of Australia ('FCC') have variously been described as 'litigants in person', 'unrepresented litigants' or 'self-represented litigants'. For the purposes of this study, the term 'self-represented litigant' or 'SRL' is used throughout.

Similarly, various terms are used for a legal practitioner assisting an SRL: 'duty solicitor', 'duty lawyer' and 'duty counsel'. Here, 'duty lawyer' is used throughout.

For the purposes of this thesis, the 'court/s' or the 'family court/s' refer to the Family Court of Australia, the Family Court of Western Australia, the (then) Federal Magistrates Court (Family Law Division) renamed the Federal Circuit Court in 2013, unless specifically noted.

The terms 'duty list' or 'call over list' refer to the first date on which any application is listed before the family courts.

The term 'clinic session' refers to free legal information and advice sessions provided by legal assistance services or agencies.

Introduction

A Background

The number of self-represented litigants appearing in the family courts has remained high over the past 10 years.¹ The presence of Self-Represented Litigants ('SRLs') needs to be recognised as a normal part of the litigation process.²

The research in this field has generally focused on understanding why persons appear in the family courts unrepresented,³ and the impact of self-representation on those involved in the family law system.⁴ This study does not seek to re-examine self-representation from these perspectives. A detailed literature review by Richardson, Sourdin and Wallace provides a comprehensive summary of the studies dealing with the reasons for and characteristics of self-representation and how the legal system has responded

¹ Annual Reports of the Family Court of Australia and the Federal Circuit Court of Australia since 2005 show that 30–40% of litigants appear self-represented at some stage of their proceedings, mainly in children's cases. These figures are confirmed in various reports: Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000), 81, ('Litigants'); Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants' (Research Report No 19, Family Court of Australia, 1999) — this report found that 35% of Family Court matters involved at least one party who was unrepresented at some stage in proceedings; Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, ('Productivity Commission'), see Appendix F which cites data from the Family Court of Australia that 'between 30 and 40 percent of matters involve litigants who self-represent at some point in their proceedings' and from the Federal Circuit Court that 'the proportion of self-represented appellants has remained steady over the last decade, at around 40 to 50%'.
² Family Court of Australia, 'Self-Represented Litigants: A Challenge — Project Report December 2000–December 2002' (Family Court of Australia, 2003); Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' AIJA Courts and the Public Committee (2001); Australian Law Reform Commission, *The Unrepresented Party*, Background Paper 4 (December 1996).
³ Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System' (Research Report, February 2004); Melanie Dye, 'An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court' (Federal Magistrates Court of Australia, October 2004).
⁴ John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000); Family Law Council, Litigants, above n 1; Australian Law Reform Commission, *Managing Justice — A Review of the Federal Civil Justice System*, Final Report No 89, (2000), 359–360 ('*Managing Justice*').

to SRLs.⁵ The present study explores the historical perspective of SRLs as a background to the introduction of the Family Law Duty Lawyer Scheme (the 'Scheme') to examine its impact on the family law system in Tasmania.

In the early 2000s, judicial officers at the highest level commented on the increasing incidence of SRLs appearing in all courts,⁶ albeit with the family courts bearing 'the burden'.⁷ Reports commissioned by the Family Court of Australia ('FCA')⁸ or law reform bodies regarding access to justice⁹ found that SRLs were disadvantaged by the lack of legal representation.¹⁰ They reduced the efficiency of the court system by requiring more time from judges and court staff than represented parties, and caused delays by being unprepared on the day or by seeking adjournments to allow documents to be redrafted. Studies and reports also found that self-representation caused high levels of stress and frustration for all those involved in the family law system, not least for SRLs

⁵ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Literature Review* (Australian Centre for Court and Justice System Innovation, Monash University 24 May 2012) citing Dewar, Smith and Banks, above n 4; John Dewar, Jeff Giddings and Stephen Parker, 'The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland: A Research Report' (Faculty of Law, Griffith University, 1998); Rosemary Hunter, Jeff Giddings and April Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (Griffith University, May 2003); Family Law Council, Litigants, above n 1, that the rising numbers of SRLs are due to reductions in legal aid; and citing Australian Law Reform Commission, *Review of the Federal Civil Justice System Part Two: The costs of litigation in the Family Court of Australia*, Discussion Paper 62, Australian Government Printing Services, (1999) that rising costs of litigation result in increases of SRLs.

⁶ Murray Gleeson, 'The State of the Judicature' (Paper presented at the 13th Commonwealth Law Conference, Melbourne, 17 April 2003). Gleeson commented that more than one-third of applications in the High Court are made by SRLs and 'their success rate is very low'. The High Court of Australia *Annual Report 2001–2002* (High Court of Australia, 2002). Gleeson had first delivered this speech in 1999 (Australian Legal Convention, Canberra, 10 October, 1999); Anthony Mason, 'PILCH: Access to Justice and the Rule of Law' (Keynote speech delivered at the 10th Anniversary Dinner, Parliament House, Melbourne, 9 September 2004).

⁷ Alastair Nicholson, 'The State of the Court' (Address presented at the Third National Family Court Conference, Melbourne, 20 October 1998), Family Court of Australia, <<http://www.familycourt.gov.au/papers/html/speech.html>> 18; Alastair Nicholson and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24 *Melbourne University Law Review* 756, 780.

⁸ Dewar, Smith and Banks, above n 4.

⁹ Family Law Council, Litigants, above n 1, 36–40; Australian Law Reform Commission, *Managing Justice*, above n 4.

¹⁰ Family Law Council, Litigants, above n 1, 36–40; Australian Law Reform Commission, *Managing Justice*, above n 4.

themselves.¹¹ There was acknowledgement that services should be available to assist SRLs, which would have a beneficial effect in improving the efficiency of the family courts.¹²

The Family Law Duty Lawyer Scheme (the 'Scheme') was introduced on 29 March 2005¹³ as one of the Australian Government's responses to the numerous courts, government committees and studies calling for an early intervention strategy to deal with the growing number of SRLs.¹⁴ The Scheme operates under guidelines stated in a National Protocol (the 'Protocol').¹⁵ The duty lawyer is to provide advice and limited representation to assist SRLs in relation to 'an imminent court event'.¹⁶ The Protocol does not define 'imminent' and, although the guidelines state that assistance 'will normally be provided on one occasion only',¹⁷ the extent of the assistance is at the discretion of, and dependent on the availability of, the duty lawyer.¹⁸ A key feature of the Scheme is that, unlike the requirement for grants of legal aid, the assistance of the duty

¹¹ Dewar, Smith and Banks, above n 4, 11–12; Hunter, Giddings and Chrzanowski, above n 5; Family Law Council, Litigants, above n 1.

¹² Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004). The Committee recommended the Australian Government provide funding for a national family law duty solicitor service, 68 [4.101]. The recommendation was accepted (see below).

¹³ The Australian Government allocated funding of \$3.3m per annum indexed over four years to State and Territory LACs to establish the Family Law Duty Lawyer Scheme. It is funded under the National Partnership Agreement on Legal Assistance Services to provide services directed towards 'earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoids the need for litigation'. Council of Australian Governments 2010, 'National Partnership Agreement on Legal Assistance Services' (COAG), <http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/Other/Legal_Assistance_Services_NP.pdf>.

¹⁴ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Department of the Attorney-General, 2001), 1–115; Commonwealth Attorney-General's Department, *A New Approach to the Family Law System: Implementation of Reforms* (Discussion Paper, 10 November 2004); Australian National Audit Office, *Client Services in the Family Court and the Federal Magistrates Court* (Report No 46, Australian National Audit Office 20 May 2004); Family Court of Australia, *Feedback from Focus and Discussion Groups: Consultation with Family Court Clients and Legal Practitioners* (August 2005).

¹⁵ Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme Protocol* (2007) <<http://www.aph.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subId=206418>>.

¹⁶ *Ibid* 2.1.

¹⁷ *Ibid* 3.2.

¹⁸ *Ibid* 2.3.

lawyer is free and neither means nor merit tested.¹⁹ The duty lawyer can therefore assist persons who may be ineligible for legal aid but cannot afford private representation to help advance or resolve their family law matters.

The Legal Aid Commission of Tasmania ('LACT') was granted funding for two duty lawyer positions at 0.5 FTE each: one in Hobart and another in Launceston. The Launceston office of LACT also provides duty lawyer services to the FCA and the FCC sittings in Burnie and Devonport.²⁰

Despite the Scheme being in operation for over 10 years, there has been no study of its impact on those who use its service. This thesis presents the results of a mixed-methods research project conducted in Tasmania, which examines the role, use and efficacy of the Scheme in the family law system. The study was based on quantitative and qualitative data from SRLs, judges of the FCA and FCC, court staff and family law practitioners who come into contact with the duty lawyer. SRLs who had not seen a duty lawyer provided their opinions on what benefit they thought a duty lawyer could bring to their family law dispute.

The current study examines what the Scheme delivers to all those involved in the family law system in Tasmania. It also looks at future reforms which may be implemented to improve the service.

Although important research has been done on SRLs in the context of family law, it has mainly focused on understanding why people appear unrepresented and what can be done to mitigate the effect of self-representation.²¹ Recent research into legal assistance services acknowledges the benefits of the

¹⁹ Legal Aid Commission of Tasmania, *Grants Guidelines*: Guideline 2 – Means Test (1) (a) (i)–(iii); Guideline 3 – Merits Test (1) Commonwealth Merits Test; (2) State Merits Test.

²⁰ Both positions are funded for the full time equivalent (FTE) of two and a half days per week (0.5 FTE). Duty lawyer services to Launceston, the North and North West of Tasmania are not necessarily provided by the same duty lawyer.

²¹ Australian Law Reform Commission, *Managing Justice*, above n 4; Law Council of Australia, above n 2.

Dewar, Smith and Banks, above n 4; Family Law Council, *Litigants*, above n 1; Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Research Report, Law and Justice Foundation August 2002), 178 (Hunter et al).

Scheme and has recommended that it be expanded and provides a greater range of services to accommodate the needs of SRLs. This research touched on aspects of the Scheme rather than examining how the Scheme operates. This research has been funded by either government bodies or interest groups focused on the economic benefits to legal assistance agencies of providing services for SRLs. It has compared service delivery models and emphasised that services should be delivered with efficiency and effectiveness.²²

This thesis draws on the recommendations of this body of work and argues that the Scheme should be expanded to meet the demands of the growing numbers of SRLs. A key unique contribution is that it identifies what SRLs and other participants in the family law system think the duty lawyer service should be providing. It contributes to the literature on the difficulties SRLs confront in working through a dispute and expands it by demonstrating, through action research, whether there are any limitations about the service and if so, ways to improve the delivery of the service.

To the best of the researcher's knowledge, there has been no previous study of these aspects of the Scheme. This is certainly the first study of its kind which examines the Scheme in Tasmania as it changed from the traditional method of delivering a service to SRLs on the day when their matter was in court to one that offered improved access to duty lawyer services.²³

²² Productivity Commission, above n 1; Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions* (Final Report, Prepared for the Australian Government Attorney-General's Department 2014) ('Allen Consulting'); PricewaterhouseCoopers, ('PwC') 'Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism' ('Legal Aid Funding') (November 2009) 1–100; Cate Banks, 'Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane' (Cate Banks Consulting, June 2013; Jeff Giddings, Blake McKimmie, Cate Banks and Tamara Butler, 'Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service', Griffith University (2014) Self-represented Litigants, Paper 3. The reports written after the introduction of the Scheme in 2005 are discussed in Chapter II.

²³ Some Commissions use in-house family lawyers on a rotating roster to spend part or all of each sitting day at the court. LACT provides duty lawyers to the Family Courts in Hobart and Launceston on duty list days (first date of the listing of any application) and during clinic sessions (legal information and advice sessions). See also Legal Services Commission of

This thesis has benefited from insights emerging from an evaluation conducted in 2012 by the Law and Justice Foundation NSW into the role and impact of the Legal Aid NSW ('LANSW') Early Intervention Unit ('EIU').²⁴ The EIU evolved from the traditional Scheme embedded in Legal Aid to become a separate unit, currently employing 20 dedicated duty lawyers working at the family courts in Parramatta and at outreach centres in New South Wales. The EIU report noted that an evaluation of the previous duty lawyer Scheme had not been conducted but that the current data indicated that 'work undertaken by the EIU duty service ... is well beyond the scope, guidelines and capacity of the previous duty service'.²⁵

The primary focus of the EIU report was to evaluate the Unit from its commencement on 14 March 2011 to 31 March 2012; it did not explore in any detail what problems or difficulties existed under the traditional Scheme, which led to its abandonment and replacement by the EIU. It did not provide details or data on the previous Scheme but quoted a judicial officer who observed that the difference between the old and new service was 'chalk and cheese. It was a real band aid before, now it's a proper, resourced system that really does assist the court but particularly assists the litigants'.²⁶

The EIU report aimed to retrospectively evaluate the duty lawyer services and quantify the types of outcomes from the EIU in order to justify its continued

South Australia, Legal Aid ACT and Northern Territory Legal Aid Commission. Legal Aid Queensland has family law duty lawyers in the Brisbane, Cairns and Townsville Family and Federal Circuit Courts. The service also visits other towns to coincide with the courts' circuits. VicLA's webpage notes that duty lawyer services 'may not be available every day'. VicLA will be piloting a duty lawyer service based on LANSW EIU, see Suzie Forell and Michael Cain, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', Law and Justice Foundation of NSW (2013); also see Victoria Legal Aid, 'Family Law Legal Aid Services Review Final Report (June 2015), Recommendation Eight. Legal Aid of Western Australia provides Family Court Services where two lawyers, a coordinator and a paralegal are located at the Family Court of WA and available each day during business hours. These duty lawyers are dedicated duty lawyers who do not carry in-house files.

²⁴ Forell and Cain, *ibid.* This report is discussed in Chapter II.

²⁵ *Ibid* 24.

²⁶ *Ibid* 30.

existence. The objective of this thesis differs.²⁷ It identifies features of the traditional Scheme from the perspective of the participants in the family law system and, having done so, uses the action research method to identify changes that may improve the Scheme while working with existing Legal Aid resources.

With the exception of the EIU report, research or information on the Scheme focuses on the economic benefits duty lawyer services generally provide in comparison with other legal aid or legal assistance services.²⁸ There has been no study of what SRLs and other key participants in the family law system know about the Scheme, what they think is its purpose, or how they use the duty lawyer service.

B Overarching research objectives

The objectives of the research were to understand why and how the Scheme works, what benefit it provides to SRLs from the perspectives of SRLs, judges, lawyers and court administrative staff whose life and/or work is affected by the duty lawyer, and the impact of the Scheme on access to justice. It also presents the views of the duty lawyers on some of the service's shortcomings and their suggestions about how to address these.

One of its practical albeit incidental outcomes was to generate a greater awareness of the Scheme in Tasmania. The conduct of the research was itself a successful awareness-raising exercise. The benefit of inviting participants in a small jurisdiction such as Tasmania is that it made every person who was exposed to the research more aware of the service provided by duty lawyers.

²⁷ The EIU report is discussed in greater detail in Chapter II. It is a retrospective evaluation of the EIU after 12 months of operation without justifying the reasons for the change from the traditional Scheme to the service provided by the EIU.

²⁸ Productivity Commission, above n 1; Allen Consulting, above n 22; PwC, Legal Aid Funding, above n 22.

C Aims of the thesis

This thesis conducted an exploratory study to gather participant perspectives in Tasmania of how the Scheme operates and what it could or should be doing for SRLs. Its key aims are to:

- explore how the Scheme is perceived by SRLs and other key participants in the family court system through an investigation of the historical background and context which existed before the introduction of the Scheme in 2005 (Chapter I);
- detail the literature which discusses duty lawyer services after the introduction of the Scheme to understand how the Scheme has evolved, including comparison with schemes in other jurisdictions (Chapter II);
- describe and justify the methodology adopted for gathering data and explain the research process (Chapter III);
- discover the views of SRLs and other key participants in the family court system in Tasmania as to the advantages and drawbacks of the Scheme so as to determine whether the Scheme is positive and/or worthwhile (Chapter IV);
- draw conclusions about consistent patterns or themes which emerged about the conduct of the Scheme (Chapter V); and
- make recommendations for reform to the Scheme to increase awareness of the Scheme, make the service more accessible and to improve the delivery of the duty lawyer service in Tasmania (Chapter VI).

D Research questions

Four research questions guided data gathering and interpretation:

1. How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?
2. What is the purpose and nature of the duty lawyer role from the perspective of the key participants?

3. What is the impact of the Scheme on SRLs and other key participants in the family law system?
4. What improvements could be made to the Scheme better to deliver the duty lawyer service?

E Research strategy

A review of the literature on self-representation provided a background against which to understand the reasons for, and impact of, appearing unrepresented in the family courts. The review shows very little empirical research into the work of duty lawyers and their interaction with other participants in the system. The choice of research methods was influenced by the researcher continuing to work as the duty lawyer in Hobart during the study and having access to potential respondents.

This study employed a mixed methods research design involving surveys and interviews conducted over three stages. The first stage involved a survey of SRLs and interviews with judicial officers and the Launceston duty lawyer working for LACT in mid and late 2013. An action research strategy was used after this first stage to test the analysis of results in the context of the reality of family law practice and make changes to the delivery of the duty lawyer service. The third stage involved surveys of court staff and family law practitioners conducted in August 2015 which provided insights into the issues previously explored and built on the narrative about how the Scheme operates.

The literature on grounded theory strategies was helpful in locating the researcher not as a passive, neutral or detached observer but, instead, as one who takes an active part in the process. In using this method, the researcher was careful to engage in reflection to account for personal bias to the study.

F Limitations of the study design

It was not the purpose of this study to conduct an evaluation of the Scheme in general or to justify its existence, but to examine how it worked by conducting a

small, select study in a familiar jurisdiction on a topic in which the researcher had a specific interest. The limitations of this study are outlined in greater detail in Chapter III.

G Scope of the thesis

A detailed examination of duty lawyer schemes generally was beyond the scope of this thesis. Rather, the focus is on the Scheme in Tasmania through an investigation of people who have contact with the Scheme. The scope was limited to Tasmania to fit in with the researcher's time and budgetary constraints. Although the scope of the study was small geographically, the numbers and range of people interviewed and surveyed provided a significantly representative sample from which to draw experiential inferences.²⁹ It was not intended to obtain statistical sampling with the aim of making generalisations about the results.

The thesis did not purport to survey a representative sample of a national population, nor seek to draw conclusions based on such a methodology. The study placed primary emphasis on specific knowledge rather than generalised knowledge. Its purpose was to describe and illustrate both what was common to five sets of participants and also how they interacted differently with the Scheme. The researcher decided not to extend the scope of the study outside Tasmania as it was considered that the cross-section of participants would provide sufficient information to identify important common patterns on their views of the Scheme. Moreover, merely expanding the range of participants outside Tasmania would not necessarily have produced new information.³⁰

²⁹ At the time the judges were interviewed, August to November 2013, there were 27 judges of the FCA and 63 of the FCC.

³⁰ Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013); Erin Chesney, Julie Macfarlane and Susan Rice, 'Tracking the Continuing Trends of the Self-Represented Litigant Phenomenon' (Data from the National Self-Represented Litigants Project 2014–2015) 11–12. Macfarlane's 2013 study involved 259 SRLs who participated in interviews and/or focus groups interviews; it was followed up in

The conclusions from this study are about the selected sample of participants in Tasmania. They cannot be extended to make generalisations about the impact the Scheme has in other jurisdictions. However, the changes made to the delivery of the duty lawyer service and the recommendations arising out of the results from the data may apply to similar sized jurisdictions and also provide some insights which should at least be considered in other jurisdictions.

H Structure of the thesis

This thesis comprises six chapters, each linked to the aims outlined above.

Chapter I discusses the social and historical context against which to assess the reasons for, and the impact of, the growing number of SRLs, and to provide a framework for discussing the problems posed and faced by SRLs in their interaction with the family law system. It discusses the phenomenon of self-representation as a broad issue which gave rise to a program of responses designed to improve access to justice for SRLs in the family courts.

The chapter outlines the policy initiatives and intentions underpinning the Scheme. It assesses them against philosophical assumptions about access to justice to understand why it is important that governments, courts and legal service providers respond to self-representation. It looks at the effect of the family law reforms in 2006 and considers why the Family Court, in particular, made modifications to the adversarial system and how the reforms led to a change in judicial approach to SRLs.³¹ It also considers the impact of self-representation upon a range of participants in the family law system to

2014 using data from 69 SRLs based on the same Intake Form used in the original study. The data from the shorter study did not provide significantly different results.

³¹ The Family Court adopted the Less Adversarial Trial in 2004 as a best practice model. It was the subject of Practice Direction No 2 of 2004 issued 4 March 200, and, part of amendments introduced with the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (SPR Act 2006) (Cth). However, the High Court in *R v Watson; ex parte Armstrong* (1976) 136 CLR 248 ruled that s97(3) of the *Family Law Act 1975* which provides that the Family Court shall proceed without undue formality does not authorise a judge to convert proceedings from the traditional adversarial model. These aspects are discussed in Chapter I: E (v) and (vi) in relation to the less adversarial trial process.

determine the extent of the challenge posed by SRLs in family courts. This enquiry provides a context for the introduction of the Scheme.

Finally, the chapter draws comparisons with other duty lawyer schemes in Australia in the criminal jurisdiction and similar duty lawyer or 'counsel'³² schemes in an international context.

Chapter II examines the research concerning duty lawyer services after the introduction of the Scheme. Findings about the duty lawyers' economic value and the benefit of extending those services to meet the increasing needs of SRLs are drawn from this literature.³³ The theoretical³⁴ and practical³⁵ literature finds that the Scheme is 'an effective and efficient way of assisting' SRLs.³⁶ It also notes that expansion of duty lawyer services provides opportunities for legal assistance services to develop new strategies to reduce barriers for SRLs in accessing the family law system.³⁷

The chapter provides a brief discussion of the EIU as the model used in this study to expand duty lawyer services.

Chapter III discusses the methodological approach, the scope of the research and the strategy and design undertaken. It describes and justifies the reasons for choosing a mixed method approach and the use of interviews and surveys to

³² The term 'duty counsel' is used in Canada for family law duty lawyers.

³³ Productivity Commission, above n 1; Allen Consulting, above n 22; PwC, Legal Aid Funding, above n 22; PricewaterhouseCoopers, ('PwC') 'Economic Value of Legal Aid: Analysis in Relation to Commonwealth Funded Matters with a Focus on Family Law' ('Economic Value') (Report for National Legal Aid, 2009).

³⁴ Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper presented at the Law and Justice Foundation of NSW Access to Justice Workshop, NSW Parliament House, Sydney, 10 July 2002).

³⁵ Macfarlane, above n 30, 128.

³⁶ Productivity Commission, above n 1.

³⁷ Allen Consulting, above n 22. The average cost of duty lawyer services in Australia was \$375 per session (at 521) and duty lawyer services were more effective and cost-efficient than in-house family law services (at 522); the efficiency of duty lawyer services was also noted in PwC, Economic Value, above n 33; also see Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia Wide Survey: Legal Need in Australia' (LAW Survey) (Law and Justice Foundation of NSW, Sydney, 2012), <[http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/"LAW_Survey_Australia.pdf](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/)>. ('Coumarelos, et al 2012').

gather data. It discusses the research philosophy employed and explains how the grounded theory approach employing action research was used.³⁸

The chapter explains the reasons why data collection occurred over three distinct periods of time: during stage one, the survey of SRLs and interviews occurred in mid-to late 2013; stage two was a period of approximately nine months at the beginning of 2014 when changes were made to the Scheme as part of action research; and stage three involved the survey of court staff and family law practitioners, conducted in August 2015.

The chapter identifies limitations in the research design. It also describes the methods of data analysis and the reasons why the results are trustworthy.

Chapter IV outlines the results of the study. The chapter presents the data in relation to the research questions and identifies emerging themes. The data are presented in tables, as well as direct comments from participants.

The chapter is in three parts. Part I: B.1.A presents the results from the surveys of SRLs. The qualitative data from the interviews with the judges of the FCA and FCC in Tasmania are presented in B.1.B and the interview with the duty lawyer working for LACT in Launceston and comments from the researcher as the Hobart duty lawyer are discussed in B.1.C. Part II: C documents the incremental changes to the Scheme implemented as a result of the action research process. This part includes an explanation for the gap in timing between the data collection in Parts I and III. Part III: D provides the results from the stakeholder survey of court staff of the FCA and FCA in Hobart and Launceston, and family law practitioners state-wide who are members of the Family Law Practitioners Association of Tasmania ('FLPAT').

The results identify issues encountered by participants in the Scheme and provide valuable quantitative and qualitative data and first-hand opinions from

³⁸ David E Gray, *Doing Research in the Real World* (Sage, 2nd ed. 2009) 30; Kurt Lewin, 'Action Research and Minority Problems' (1946) 2(4) *Journal of Social Issues*, 34-46.

those who have had involvement in the Scheme, regarding problems and suggestions for improvements.

Chapter V discusses analyses and interprets the data sets in Chapter IV. It explains how the results answer the research questions in the context of the identified themes. The chapter confirms that the results are consistent with previous research, indicating that duty lawyer services are highly effective but limited if linked to a prescribed court event. The results also confirm findings of previous studies that there is demand for enhanced and extended duty lawyer services.

Chapter VI draws conclusions and makes recommendations to raise awareness of the duty lawyer service and improve the Scheme to better meet the needs of SRLs and other participants in the family court system. It advocates an appropriate model in Tasmania that offers a wider range of services at different stages of an SRL's dispute. The recommendations made in this chapter are in line with findings in other reports on legal assistance services, that enhanced and extended duty lawyer schemes provide increased access to justice for SRLs, and associated efficiencies for the court system.³⁹ The chapter suggests a review of duty lawyer services in Tasmania and future research building on this study to examine and evaluate the Scheme after the implementation of any or all of the recommendations made here, to determine the impact of the changes.

I Summary of the results

The analysis of the data revealed clear themes from all participants:

- a range of views about how the Scheme meets access to justice for SRLs;

³⁹ Productivity Commission, above n 1.

- consensus that intervention by the duty lawyer prior to SRLs filing proceedings significantly improves outcomes for everyone involved in the court system;
- divergent levels of awareness that the Scheme is available and some confusion as to what the duty lawyer can or cannot do;
- awareness that SRLs need the help of the duty lawyer with ‘everything’ and positivity about the usefulness of the Scheme; and
- suggestions for an enhanced duty lawyer service offering more time for SRLs with discrete task assistance at different stages of their litigation.

Based on the empirical results and the statistical data from the LACT prior to and after the changes made to the Scheme, it is concluded that the Scheme has been a positive initiative in the delivery of access to justice for SRLs while increasing the efficiency of the courts.

Participants in the study recognised that the Scheme was not meant to meet the ideal of full representation under the adversarial system, and that duty lawyer services should not be continuous or unfettered. There will always be a gap between the ideal, where both parties are represented, and the realities of limited resources; but participants considered the Scheme a valuable service that goes some way to improving access to justice for SRLs.

The results in this thesis demonstrate that it is possible to extend the principles of practice of the Scheme within the guidelines of the current Protocol to increase its utility. This may not eliminate every type of inequality an SRL may suffer, but it is far preferable to navigating the family law system on their own. Moreover, as demonstrated by the EIU model, the service can assist SRLs at different stages, and on more than one occasion, as their litigation becomes more complex, without compromising the guidelines of the Protocol.⁴⁰ This assistance not only benefits SRLs but allows the family courts to operate at

⁴⁰ Ibid 24. This report notes that in ‘four out of five matters clients received more than one type of assistance’ from the duty lawyers and that ‘some clients require more intensive support than information or advice on one occasion only’ as they have multiple problems.

greater efficiency and, arguably, greater effectiveness for all those involved in the court system.

J Conclusion

With SRLs emerging in significant numbers in the family court, the introduction of the Scheme is one measure of assisting them with access to legal information, advice and representation. Although a great deal is known about self-representation generally, there has not been a study which details the impact of the Scheme on SRLs and other key participants in the family law system. This thesis explores the benefits of a duty lawyer's intervention and suggestions for the enhancement of the Scheme.

Chapter One

Self-representation and background to the Family Law Duty Lawyer Scheme

A Introduction

This chapter examines the historical background against which the Scheme evolved in order to understand why the Commonwealth Government introduced it nationally. This information forms the framework against which the results from this research will be analysed to identify the role the Scheme plays in the context of the broader family law system and how it contributes to providing access to justice for SRLs. It first looks at the history of legal aid funding from 1997, when the Government made changes to the guidelines for funding which resulted in significant reductions in the availability of aid in family law matters and had the effect of removing many types of family law disputes from the scope of civil and family legal aid. The effect these funding cuts may have had on the operation of the family courts is central to placing the Scheme in the economic and political climate of the time and to understanding the connection between the decrease in legal aid and the growing numbers of SRLs in the family courts.

The chapter looks at reports and reviews about the Family Court¹ and commentary from the Law Council of Australia² and law societies³ which led to

¹ John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000) 11–12; Rosemary Hunter, Jeff Giddings and April Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (Griffith University, May 2003); Family Law Council, 'Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council' (Canberra, August 2000) ('Litigants').

² Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System' ('Erosion') (Research Report, February 2004); Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into Legal Aid and Access to Justice* (Commonwealth of Australia 2004); Law Council of Australia, 'Chronically underfunded legal aid commissions suffer further cuts in federal budget' (Media Release,

legislative and policy reforms designed to improve the family law system for participants.

It notes the first call in a judgment from the Family Court in 1992 for the introduction of a duty lawyer and discusses why the court considered it important that SRLs receive some assistance. It examines other attempts by the family courts to ensure that SRLs receive a fair hearing. Judicial guidelines to ensure the maintenance of impartiality when parties are self-represented are explored. Family Court initiatives to deal with SRLs through case management plans⁴ and streamlined procedures are investigated. The formation of the Federal Magistrates Court ('FMC') in 2000 (now called the Federal Circuit Court, ('FCC'))⁵ and an evaluation of its services in 2002 are briefly canvassed.

The evolution of the Scheme is considered against the philosophical framework of the FCA as a 'helping court'⁶ engaging in non-adversarial processes to encourage parties to seek and accept assistance from a variety of services to solve their problems. The reasons why family courts take a less adversarial approach and how they balance their duty to provide a fair hearing for SRLs with their obligation to be cost-effective in relation to the use of public resources are discussed. The family law reforms in 2006 which introduced less adversarial

13 May 2014). The Law Council pointed out that 'Legal Aid Commissions have been forced to impose ever more stringent means tests and quotas on the services they provide (to the extent) that some people who qualify for pensions or benefits do not qualify for legal aid.

³ See C Laird, 'Legal Aid Cuts Condemned' (1996) 70(10) *Law Institute Journal* 10; 'Anger over Legal Aid Cuts' (1996) 31 (7) *Australian Lawyer* 9; B Withers, 'Legal Aid: The National Perspective' (1996) 18 (8) *Bulletin (Law Society of SA)* 26; T Griffin, 'Clawback after Aid Bombshell: Attorney Vows to Fight' (1996) 18 (8) *Bulletin (Law Society of SA)* 24; John Doyle, 'Chief Justice Calls for Leadership in Legal Aid' (1996) 18 (11) *Bulletin (Law Society of SA)* 12; 'Legal Aid Crisis Continues' (1997) 32 (2) *Australian Lawyer* 28; 'Barristers Protest Legal Aid Funding Cuts in William Street Rally' (1997) 100 *Victorian Bar News* 14; James Syme, 'Crisis in Legal Aid—President's Page' (1996) 70 (1) *Law Institute Journal* 3, cited in Mary Anne Noone and Stephen Tomsen, 'Service Beyond Self-Interest? Australian Lawyers, Legal Aid and Professionalism' (2001) 8 *International Journal of the Legal Profession* 3.

⁴ Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' (AIJA Courts and the Public Committee 2001).

⁵ The Federal Magistrates Court of Australia was established by the *Federal Magistrates Act 1999* (Cth) and had its first judicial sitting in July 2000.

⁶ Helen Rhoades, 'The "Helping Court": Exploring the Therapeutic Justice Origins of the Family Court of Australia' (2011) 2 *Family Law Review* 17; Alfred Allan, 'Therapeutic Jurisprudence in Family Law' (Paper presented at the Family Court of Western Australia's in the Child's Best Interest Conference, Perth, 9 November 2001).

processes are then examined.⁷ It is argued that these features demonstrate the FCA's particular philosophy in comparison to other courts in the primarily adversarial justice system.

This chapter also looks at the literature and commentary around the evolution of the Scheme, including the pilot program conducted from August 2003 to June 2003 by LANSW in the Parramatta registries of the family courts. It then introduces the Scheme, identifies its principles and discusses how it operates under the Family Law Duty Lawyer Scheme National Protocol (the 'Protocol').⁸

Finally, the chapter explores other duty lawyer schemes in Australia and examines issues and strategies in working with SRLs, including duty lawyer or similar services in international jurisdictions.

B Self-representation and legal aid funding

(i) History of legal aid funding

The history of legal aid funding from the 1970s shows that the increasing cost of family law matters has not been accompanied by a corresponding increase in government funding.⁹ Moreover, because of the disparity between the legal aid fees paid to the private profession and the actual cost of practice, commentators state that there was a decline in the amount of legal aid work that private practitioners were prepared to do, and those firms continuing legal aid work tended to use less experienced practitioners in the Family Courts to make

⁷ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

⁸ Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme National Protocol ('Protocol')* (2007), <<http://www.apf.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subId=206418>>.

⁹ Law Council of Australia, *Erosion*, above n 2.

the work more cost-effective.¹⁰ This has been referred to as the 'juniorisation' of practice.¹¹

The reports arguing that reduced legal aid funding was responsible for the rising number of SRLs in the family courts emanated primarily from the Law Council of Australia, from as early as 1994.¹² The Law Council recommended an increase in legal aid.¹³ This was also the finding of a number of other reports and papers.¹⁴

These recommendations were not taken on board: in fact, the Commonwealth Government dramatically reduced legal aid funding in 1997.¹⁵ It entered into new funding agreements with the state and territory Legal Aid Commissions ('LACs') which directed that Commonwealth funding should be expended only on federal matters according to Commonwealth guidelines which introduced a ceiling on funding for family law matters. This had the effect of reducing and restricting the Commission's expenditure on family law matters.

Concerns in relation to legal aid funding were also explored in the report of the Senate Legal and Constitutional References Committee in 1998¹⁶ and again in its final report in 2004,¹⁷ which recommended that the Commonwealth Government provide funding in the 2004–2005 budget to establish 'a new duty

¹⁰ National Legal Aid Secretariat, *Family Law Private Practitioner Survey 2002* (2002).

¹¹ Law Council of Australia, *Legal Aid Funding in the 90's* (1994); Law Council of Australia, *Erosion*, above n 2; *R v Carter* [2003] 2 Qd R 402, 9, 50 where the court commented that junior counsel with limited experience appearing in legal aid matters, especially at trial and appeal levels, could result in a miscarriage of justice.

¹² Law Council of Australia, *Legal Aid Funding*, above n 11.

¹³ *Ibid.*

¹⁴ Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants' (Research Report No 19, Family Court of Australia, 1999); John Dewar, Jeff Giddings and Stephen Parker, 'The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland: A Research Report' (Faculty of Law, Griffith University, 1998); Family Law Council, *Litigants* above n 1.

¹⁵ Susan Armstrong, 'What has Happened to Legal Aid?' (2001) 5(1) *University of Western Sydney Law Review* 91, <<http://www.austlii.edu.au/au/journals/UWSLRev/2001/8.html>>. The Commonwealth Attorney-General's Department, told to save \$33 million over four years as part of the Government's 'efficiency dividend', took it all from the legal aid budget.

¹⁶ Senate Legal and Constitutional References Committee, above n 2.

¹⁷ *Ibid.*

lawyer service for self-represented litigants in family law matters'.¹⁸ The Committee acknowledged criticism that the Scheme would not 'fill the gaps in legal aid funding'¹⁹ but argued that 'while it may not be a complete solution ... the duty lawyer scheme ... could usefully be adopted in all states and territories'. This recommendation was tempered with a note of caution: that 'a duty solicitor scheme which merely performs a role as a mouthpiece, with solicitors consulted only minutes before the matter is heard, will not adequately address the problems raised by the lack of legal representation'.²⁰

A comment made by Sackville in the paper revising his 2002 report looking forward to the introduction of the Family Law Duty Lawyer Scheme is salient in this context:

Duty Solicitor Schemes should beware that they do not simply legitimise by their presence an unequal situation without changing it, and provide the illusion of representation without the substance.²¹

In 2004, the Law Council released a further report which focused on the 'erosion of legal representation'.²² Again, its recommendation to the Government was to 'increase and secure funding for those bodies responsible for managing and delivering publicly funded legal representation'.²³ The Law Council argued that reductions in legal aid funding for family law matters and increased costs of legal services would mean that more people would be appearing self-represented and that the 'growing gap between market rate and

¹⁸ Ibid [4.101], 68 and [1.6] [1.7], 222 for the funding component in relation to the Family Law Duty Lawyer Scheme.

¹⁹ Ibid [10.79], 200.

²⁰ Ibid [10.81], 200.

²¹ Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (2011) 10 (2) *The Judicial Review*, 221 [4.19], [4.20]; *Dietrich v The Queen* (1992) 177 CLR 192; 109 ALR 385, 397.

²² Law Council of Australia, *Erosion*, above n 2; National Legal Aid, Aboriginal and Torres Strait Islander Legal Services, Submission to the Joint Committee of Public Accounts and Audit Indigenous Law and Justice Inquiry (February 2004). This submission cites the Law Council's report and comments that the effect of the 1996 funding cut to legal aid has resulted in an increase in the number of SRLs, with particular reference to the Aboriginal and Torres Strait Islander Legal Services, 24, and recommends additional funding to provide, inter alia, duty lawyer assistance, in particular in regional and remote areas, 6–7.

²³ Law Council of Australia, *Erosion*, above n 2.

legal aid fees meant that fewer practitioners would be willing to work for legal aid rates'.²⁴ It further argued that this could lead to less experienced lawyers working in family law, as the gap between legal aid and the real costs of practice made it less attractive for more senior practitioners to do legal aid work.²⁵

These concerns need to be viewed in the context of it being the peak body representing the legal profession and, in particular, against one of the objectives of the Law Council's Family Law Section, which is to:

[i]nfluence development and practice of family law for the benefit of its members and the general community and to promote professional excellence and influence decision making so that the family law system in Australia is fair, respected, functional and responsive to community needs.²⁶

The Law Council's viewpoint, therefore, is predisposed primarily to represent the interests of its members. Its recommendations to increase legal aid funding in order to increase both the quality and quantity of legal representation are based on an admission that, as a cost-effective measure, private firms allocate legal aid matters to junior practitioners.²⁷ This aspect has been criticised as both compromising the quality of assistance provided to legally aided clients and limiting the experience of junior practitioners.²⁸

The Law Council stated that the family law system relied heavily on private practitioners who performed a great deal of pro bono work; but they could not

²⁴ Ibid 18–40.

²⁵ Ibid.

²⁶ The Family Law Section of the Law Council of Australia is the largest professional association for family law practitioners with almost 2,500 members.

<<https://www.familylawsection.org.au/about-us>>.

²⁷ Senate Legal and Constitutional References Committee, above n 2, citing Law Council of Australia, Submission 62 [6.19], referring to the 'juniorisation of lawyers doing legal aid work in the private profession', 41.

²⁸ Avrom Sherr, 'Editorial' (2007) 14 (1) *International Journal of the Legal Profession*, 129. Sherr cites research by Don Fleming and Anne Daly which notes how far the legal profession in Australia and elsewhere has moved from legal aid work. Fleming and Daly note the 'juniorisation' of legal aid work and consider the effect of market change on service quality. It may be that law firms see legal aid clients as an opportunity to give junior practitioners some practical experience before they tackle working for privately paying clients.

continue to do so given the rising costs of practice. The Council cited practitioners' comments that 'the system might be moving from crisis to calamity because of the low levels of remuneration'.²⁹ It argued that private lawyers engaged in legal aid work were concerned that the gap between the cost of private practice and the amounts paid by legal aid were widening.³⁰ Those doing pro bono work expressed a reluctance 'to carry the burden of inadequate legal aid by doing more work on a pro bono basis'.³¹ This was particularly the case in family law,³² where there are limits to the amount of legal aid granted for each case.³³

The Law Council's argument, that the gap between private fees and legal aid be diminished was to ensure fair compensation for family law practitioners who chose to do legal aid work. This reinforced perceptions from some commentators that cost cutting inevitably lowered quality and that lawyers were primarily concerned with their own financial interests. It may be unthinkable that lawyers who received legal aid 'would have no option but to do a second-rate job',³⁴ but some commentators have observed that 'inexorable market forces creating "supplier-induced demand" would force lawyers to cut corners'.³⁵ In these circumstances, it is argued, it is not the role of legal aid to guarantee or

²⁹ Law Council of Australia, Erosion, above n 2, 18–40.

³⁰ Ibid; Australian Law Reform Commission, *Managing Justice—A Review of the Federal Civil Justice System*, Final Report No 89, (2000) ('*Managing Justice*'), 345 citing National Legal Aid Secretariat, above n 10. The survey showed that legal aid work was primarily done by practitioners with 1–3 years post-admission experience.

³¹ Law Council of Australia, Erosion, above n 2, 18–40; Also see comments of: Michael Gawler (past president of the Law Institute of Victoria), 'Pro Bono in the Suburbs and Country,' in *For the Public Good: The First National Pro Bono Law Conference – Abstracts and Briefing Papers* (2000) 17.

³² Rosemary Hunter, 'Legal Services in Family Law' (Justice Research Centre, Law Foundation of New South Wales, 2000) 119: 'The successive changes to legal aid funding have had an adverse impact on the supply side of the legal aid market in family law'.

³³ Legal Aid Commission of Tasmania, *Grants Guidelines*, Guideline 4—Commonwealth Law Matters (3) Family Law Matters (s) Family Law Costs Management (ii) Limit on costs A. 'Under a grant of legal assistance ... is limited to \$12,500' and B. (iii) costs may be increased if 'undue hardship would otherwise be caused to an applicant'.

³⁴ Richard L Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford University Press, 2003), citing at 302 a comment by B M Birnberg of Birnberg Peirce, an established UK firm: 'Most of our work is done under legal aid'.
<<http://www.birnbergpeirce.co.uk/who-we-are/>>.

³⁵ Ibid 300.

increase the income of lawyers, especially those who are inefficient.³⁶ The implication of the Law Council's call to diminish the gap is really only looking at one side of the problem and that is the inadequacy of legal aid. The Law Council sees that the essential problem is the inadequacy of legal aid funding to pay lawyers' costs. This view ignores the major reason for the increased numbers of SRLs, which is the rising cost of legal services which are fundamentally out of reach for most people. No amounts of legal aid or pro bono services are likely to do more than ameliorate a small part of the problem of the rising cost of legal services.

While the real concern behind calling on the Government to increase legal aid may be couched in terms of access to justice, extending rights to more people and providing quality services, the Law Council may have had some financial motivation to exaggerate the problem of SRLs creating unmet legal needs without providing empirical justification and to avoid confronting the issue of rising legal costs.

It is acknowledged that as Commonwealth funding for family law matters declined and the cost of LACs providing those services increased, the impact of the gap in funding was that a growing number of people who required legal assistance could not be legally aided.³⁷ Statistics from the Family Court prior to the introduction of the Scheme show that court costs had risen significantly as a result of more people appearing unrepresented.³⁸ The Family Court introduced

³⁶ Mark Harris, 'Law Firms and Overcharging: The System Itself is Rotten', Forbes Leadership Forum, 4 March 2013, <<http://www.forbes.com/sites/forbesleadershipforum/2013/04/03/law-firms-and-overcharging-the-system-itself-is-rotten/>>.

³⁷ PricewaterhouseCoopers ('PwC'), 'Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law' ('Economic Value') (Report for National Legal Aid, 2009); Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia Wide Survey: Legal Need in Australia' (LAW Survey) (Law and Justice Foundation of NSW, Sydney, 2012), <[http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/"LAW_Survey_Australia.p](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/)
[df](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/)>. ('Coumarelos, et al 2012').

³⁸ Family Court of Australia, *Annual Report (2004–05) Outcomes and Output Map*, cited in PwC, above n 37, 15. The PwC report concluded that it was generally acknowledged that SRLs imposed a cost on the Family Court, compared to represented cases, although the cost had not been quantified, at 29. Also see Dewar, Smith and Banks, above n 1, who found that

detailed guidelines for the judiciary and reforms to case management systems and procedures and simplified forms in an attempt to improve the efficiency of the system.³⁹ The diminution of legal aid and the corresponding increase in SRLs arguably provided incentives for various reformers and commentators to claim a more equitable situation for SRLs in the family courts.⁴⁰ The Scheme was one model introduced to ameliorate the problem of access to justice for SRLs and to provide significant efficiencies to the court system.⁴¹

(ii) Effects of legal aid funding cuts on the courts

The argument that the number of people unable to access legal aid was causing problems for the family court system was supported by Dewar, Giddings and Parker⁴² and by Gable and Mohr,⁴³ who concluded that the rise in legal costs and the changes to legal aid funding resulted in rising numbers of SRLs in all courts. Dewar, Jerrard and Bowd, in discussing a 2002 Queensland perspective, referred to 'the phenomenon of self-representation' which is most

self-representation required more frequent appearances and greater delays, resulting in increased legal fees for the represented party and additional stress on court resources.

³⁹ Margaret Harrison, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (Family Court of Australia 2007).

⁴⁰ Alastair Nicholson, 'Legal Aid and a Fair Family Law Justice System' (Address to Legal Aid Forum Towards 2010, Canberra, 1999); Alastair Nicholson, 'The State of the Court' (1998) *Australian Family Lawyer* (13) (2) 9-17; Alastair Nicholson, 'Australia's Experience with Self-Represented Litigants' (2003) 77 *Australian Law Journal* 820; T & S [2001] FLC 93-086.

⁴¹ PwC, *Economic Value*, above n 37, 15, 35-36. This report found that the efficiency cost percentage of case cost to the court system decreased by 5% when a duty lawyer was involved at any stage of the proceedings.

⁴² John Dewar, Jeff Giddings and Stephen Parker, 'The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland: A Research Report' (Faculty of Law, Griffith University, 1998).

⁴³ Helen Gamble and Richard Mohr, 'Litigants in Person in the Federal Court of Australia and the Administrative Appeals Tribunal—A Research Note' (Paper presented at the Sixteenth Annual AIJA Annual Conference, Melbourne, 4-6 September 1998). They noted that SRLs are generally less likely to be successful than represented litigants (54% dismissed vs 31%); more likely to discontinue (24% vs 20%) and are more likely to be ordered to pay costs (68% vs 38%). Costs in the family court generally differ from most Australian courts in that each party bears their own costs (s117(1) FLA). The court has the power to depart from this if it considers circumstances warrant the making of a costs order (s117(2)). S117(2A) outlines such considerations.

pronounced in the Family Court where the numbers 'range from 40 per cent to 50 per cent of all matters involving at least one unrepresented party'.⁴⁴

The Australian Law Reform Commission ('ALRC') also produced a number of reports as part of an extensive review of the Federal Civil Justice System.⁴⁵ The ALRC referred to statistics which drew attention to the increasing number of people appearing in family courts unrepresented⁴⁶ and noted that the judiciary considered the increase was causing 'serious problems for the court and its ability to administer justice'.⁴⁷ However, the ALRC concluded that the evidence for these views was anecdotal;⁴⁸ there was no 'crisis' in the legal aid system and there were no empirical data to support the assertion that the savings made by denying legal aid were outweighed by the extra costs imposed on the public purse by SRLs: any claim of additional costs caused by self-representation were 'unsubstantiated and unquantified'.⁴⁹

A 2002 National Legal Aid ('NLA') survey of private practitioners in family law confirmed the findings of its 1999 survey that the private profession had reduced the amount of legally aided family law work it undertook on the basis that the disparity between the fees paid by Legal Aid and private fees meant

⁴⁴ John Dewar, Bronwyn Jerrard and Fiona Bowd, 'Self-Representing Litigants: A Queensland Perspective' (2002) 23 *Queensland Lawyer* 65; citing Dewar, Smith and Banks, above n 1.

⁴⁵ Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, Issues Paper 22, Sydney, (November 1997). This review produced a number of reports, culminating in *Managing Justice*, above n 30.

⁴⁶ *Ibid* [11.37]–[139] 342, citing Justice Research Centre Family Court Research Part One, 6 that in 40% of matters coming before the court at least one party is unrepresented.

⁴⁷ *Ibid*, 9 citing Nicholson, State of the Court, above n 40; Smith, above n 14 found that 35% of Family Court matters involved at least one party who was unrepresented at some stage; also see Rhoades, above n 6.

⁴⁸ Australian Law Reform Commission, *The Unrepresented Party*, Adversarial Background Paper 4, Australian Law Reform Commission, December 1996).

⁴⁹ Australian Law Reform Commission, *Managing Justice*, above n 30, 359–360. Senate Legal and Constitutional References Committee, above n 2, citing Law Council of Australia, *Erosion*, above n 2. The Law Council did not quantify the economic cost of SRLs but noted there was a perception that SRLs increased costs for the court and the other party by causing delays as a result of filing inadequate or inaccurate documents, not knowing about court procedure and being unprepared or unwilling to progress the matter. A 2012 study highlighted that many Australian courts still do not collect data about self-represented litigants, that the collection of data is difficult and that courts do not use a common definition of self-represented litigant; see Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Gathering Useful Information' (Final Report, Australian Centre for Justice Innovation, Monash University, 28 June 2012).

that it was not cost-effective; this was a particular problem in rural areas. This decline in legal aid work suggested that more people might not be able to access justice.⁵⁰ On the other hand, some community legal centres and lawyers' associations noted that there was an increased demand for their services from people who had been denied or could not access legal aid.⁵¹

Several studies considered the need to provide disadvantaged litigants on low incomes with fair and just access to the family court system.⁵² They found that access to the system was not necessarily dependent on the eligibility of a litigant to receive legal aid. The then Attorney-General, Daryl Williams, questioned the desirability of public funding for legal representation for all matters. He responded to the Law Council's 2000 report by saying that while the lack of legal aid funding may be a factor in some cases, 'in many other cases there are other explanations', concluding that:

[t]he problem with this argument is that it assumes that everybody should have their cases resolved by having government money given to Legal Aid Commissions to hire private lawyers for clients who want to argue a case in court. Access to justice and the provision of legal services, is not just about that, there is a whole range of other ways of resolving cases, and our policy is actually to try and keep people out of court, not put them into it.⁵³

This view holds that it is not a fundamental right that every person going through the court should receive public funding — which is not the same thing

⁵⁰ National Legal Aid Secretariat, *National Legal Aid Family Law Practitioner Survey 2002* (2002), 1; <<http://www.nationallegalaid.org/assets/Family-Law/FamilylawPractitionersurvey.pdf>>.

⁵¹ Macquarie Legal Centre, Submission No 9 to the Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (1994); West Heidelberg Community Legal Service, Submission 21, 7–8; South West Sydney Legal Centre, Submission 34, 3–4; Family Law Practitioners Association of Tasmania, Submission 37, 2–3; Tasmanian Association of Community Legal Centres, Submission 45, 1–2; Fitzroy Legal Service, Submission 48, 16; Marrickville Legal Centre, Submission 53, 6 & 9; The Law Society of New South Wales, Submission 79, 3.

⁵² Dewar, Smith and Banks, above n 1; Law Council of Australia, *Erosion*, above n 2; Hunter, above n 32, 119.

⁵³ Daryl Robert Williams, transcript from *Sprinting to the Finish Line*, Tuesday 6 November 2001, ABC, <<http://www.abc.net.au/radionational/programs/lawreport/sprinting-to-the-finish-line/3>>.

as saying that it is not the right of a person to be treated fairly in the court system.⁵⁴

The view that all parties should be legally aided relies on a philosophical assumption underpinning the adversarial system: that access to justice can best be achieved if both parties in a dispute are represented.⁵⁵ It is not clear, however, that legal aid paying the costs of full representation for both parties would always and necessarily achieve a better outcome for the parties, although it might improve the efficient conduct of the court, which is a consideration borne in mind by the family courts.

In 2002, the ALRC engaged in the largest and most comprehensive empirical study of the courts undertaken in Australia, producing the 'Review of the Federal Civil Justice System'.⁵⁶ This inquiry was in response to concerns about the rising cost of accessing the legal system, the reduction in legal aid funding, the rise in the numbers of SRLs causing delays in the courts, and concern about the standards of legal professional representation. The report noted that although there had been a rise in caseloads in some areas, and some case types were becoming more complex and taking longer to resolve, there was no evidence of an 'explosion' in litigation which the media, the courts and the legal profession frequently assumed. While significant problems existed in the Australian federal civil justice system, they were identifiable and reparable. The report recommended that the Government establish an independent review to examine 'practice, procedure and case management'.⁵⁷

⁵⁴ *Tomasevic v Travaglini* (2007) 17 VR 100. Justice Bell said at [139]–[140]: 'Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected. Most self-represented persons lack two qualities that competent lawyers possess—legal skill and ability, and objectivity ... a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance.'

⁵⁵ Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, above n 45

⁵⁶ Australian Law Reform Commission, *Managing Justice*, above n 30.

⁵⁷ *Ibid* 23.

Some commentators were of the view that putting the emphasis on the need for increasing levels of legal aid was to remove pressure from the legal system to make changes to accommodate the growing numbers of SRLs. The courts should cease looking at SRLs as the problem and, instead, consider that the legal system itself, in its complexity and formality, might be the reason why SRLs found it difficult to deal with aspects of the court system.⁵⁸ Another way of looking at the problem may be to consider how legal assistance is provided and its attendant costs. It is this aspect which may be critical in understanding the role of the Scheme.

Clearly, the call by the Law Council and law reformers for the Government to increase legal aid funding would have resulted in the Legal Aid Commission's increasing the hourly rate of legal aid paid to private practitioners. The Commonwealth and the States rely on the private sector to deliver services for approximately half of all grants of legal aid.⁵⁹ On the one hand, it can be surmised that if it were not financially sustainable or there were not a commitment to the values and culture represented by legal aid, family lawyers would not continue to do legal aid work, either as individual client representatives or as Independent Children's Lawyers ('ICLs'). More importantly, even though there is increasing financial pressure on private firms, legal practice generally has a long history of undertaking pro bono work at a

⁵⁸ Ian Coleman, 'Unrepresented Litigants and the Family Court' (1998) ALRC 73, 41; Dewar, Giddings and Parker, above n 14; Duncan Webb, 'The Right Not to Have a Lawyer' (2007) 16 (3) *Journal of Judicial Administration* 165; John Faulks, 'Self-Represented Litigants: Tackling the Challenge' (Paper presented at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013), 2, noting that self-representation is now becoming 'the norm for many litigants', that the 'justification for retaining existing court procedures based on parties' being legally represented may no longer be valid', and there is a need to 'change the system' to assist SRLs.

⁵⁹ PricewaterhouseCoopers, ('PwC') 'Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism' (November 2009) 1–100 ('Legal Aid Funding'). This report contains background on legal aid funding and provides cost comparisons of services provided by legal aid commissions [5.3.4] 42–43.

reduced legal aid fee, as a public service, and there is no reason to consider that this arrangement would not continue.⁶⁰

If legal aid rates to the private profession for individual matters were increased, there would be fewer grants made unless overall funding was increased. It might give rise, as happened in the United Kingdom when there were changes to legal aid funding, to a perception that increased payments to lawyers in private practice would significantly increase the cost to legal aid and even be open to abuse by self-interested lawyers who would reap rewards at taxpayers' expense.⁶¹ Most commentators agree that what has happened to legal aid in Australia is in line with funding cuts in the area of family law in other countries, and that the interests of the private profession are not the same as those of legal aid providers.⁶² While the private profession may seek an increase in the level of grants, the Commissions look to reducing their costs to extend the level of services to their clients. It is clear that there will never be sufficient funds to support all the services or satisfy all those who work within the system. In relation to family law, there is much to be said for looking at legal aid services such as the Scheme, which can be effective and reduce costs.

⁶⁰ See Donald Robertson, 'Pro Bono as a Professional Legacy' in Christopher Arup and Kathy Laster (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (Federation Press, 2001); also see Jill Anderson and Gordon Renouf, 'Legal Services "for the public good"', National Pro Bono Resource Centre, <http://www.nationalprobono.org.au/ssl/CMS/files_cms/forpublicgood.pdf> and John Corker, 'Access to Justice—The National Pro Bono Resource Centre' (Paper presented at the Australian Lawyers and Social Change Conference, Canberra, September, 2004), citing the 2001–02 ABS survey of the legal service industry report that, as at June 2002, 4,744 private solicitor practices (around 63%) and 2,878 barrister practices (78%) reported doing some sort of pro bono work, <http://www.nationalprobono.org.au/ssl/CMS/files_cms/ACCESS-TO-JUSTICE.pdf>.

⁶¹ Abel, above n 34, 273, 276. Abel notes this criticism of lawyers in the United Kingdom by the media may also be the public perception.

⁶² Armstrong, above n 15; Frederick Zemans and Aneurin Thomas, 'Can Community Clinics Survive? A Comparative Study of Law Centres in Australia, Ontario and England' in Francis Regan et al, *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, 1999), 65–66.

C Reasons for self-representation

The argument that an increase in legal aid would lead to a substantial decrease in the numbers of people representing themselves in family matters is not necessarily correct. The unavailability of, or ineligibility for, legal aid are not the only reasons people represent themselves in family matters.⁶³ Some choose to represent themselves because they do not want to pay for a lawyer⁶⁴ or they do not trust lawyers, or have had a bad experience with lawyers in the past and think they know their matter better than any lawyer could.⁶⁵ It has also been argued that the simplification of forms and procedures and improved information provided by the courts have made it easier for people to represent themselves.⁶⁶

In its 2000 report on the federal justice system, 'Managing Justice', the ALRC said, '[s]ome litigants choose to represent themselves ... they may believe that they are capable of running the case without a lawyer, may distrust lawyers or decide to continue unrepresented despite legal advice that they cannot win'.⁶⁷ The ALRC commented that while both anecdotal evidence and qualitative research suggested the numbers of SRLs in the Family Court were increasing, the increase was 'not entirely attributable to legal aid changes',⁶⁸ but also referred to the results of a survey they conducted in 1999 which found that more than half (54 per cent) of respondents stated the main reason they were

⁶³ Dewar, Smith and Banks, above n 1.

⁶⁴ Australian Law Reform Commission, *The Unrepresented Party*, above n 48; Law Council of Australia, *Erosion*, above n 2; Dewar, Smith and Banks, above n 1, 11.

⁶⁵ Dewar, Smith and Banks, above n 1; Dewar, Giddings and Parker, above n 14.

⁶⁶ Dewar, Smith and Banks, above n 1; Also see Macfarlane, above n 30. Macfarlane's findings indicated that 'By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.' The study notes that 'Almost every respondent (more than 90% of the sample) – across all three provinces and whether in family or civil court – referred in some way to financial reasons for representing themselves.' 39.

⁶⁷ Australian Law Reform Commission, *Managing Justice*, above n 30.

⁶⁸ *Ibid* 302–303.

unrepresented in family law matters was either their inability to pay for a private lawyer or the cessation of legal aid.⁶⁹ This shows a strong connection.

In a report commissioned by National Legal Aid in 2003, researchers found that people may be self-representing for a number of complex reasons, rather than just simply because of the unavailability of or ineligibility for legal aid. People also appear unrepresented at different stages of their proceedings, and it may be that they do not need a lawyer at each stage. Many SRLs appear unrepresented through choice.⁷⁰ Macfarlane's study finds that often, the choices SRLs make are about competing financial needs and decide to do without representation rather than sacrifice other needs, thus making a decision about the value they place on their choices.⁷¹

All these studies provide important insights into SRLs in the 1990s and early 2000s. They are grounded in the economic climate of the time and are, therefore, of historical interest. It is outside the scope of this study to criticise some commentators' narrow focus on legal aid cuts as the cause of the rising numbers of SRLs rather than questioning why the cost of litigation (due to structural issues within the court system) was beyond the means of many people. Germane to this thesis is the significance of these measures on public policy and the courts to call for the introduction of the Scheme to improve access to justice.

D Effect of self-representation on courts

In 1994, the (then) Chief Justice Mason of the High Court drew attention to the problems SRLs cause for courts:

⁶⁹ Ibid 376.

⁷⁰ Rosemary Hunter et al, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Research Report, Law and Justice Foundation, August 2002).

⁷¹ Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013)..

While the right of the litigant in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the court. All too frequently, the burden of ensuring that the necessary work of the litigant in person is done falls on the court administration or the court itself.⁷²

This view was repeated in 1996 by the next Chief Justice of the High Court:

The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.⁷³

The High Court continued the call for increased funding, with Chief Justice Gleeson commenting on the effects of legal aid cuts in a speech in 1999:

[T]he expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial is the cost of the delay, disruption and inefficiency which results from the absence or denial of representation. Much of the cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.⁷⁴

The High Court reported in 2002 that 'around 50 per cent of the time of the registry staff is taken up with self-represented litigants'.⁷⁵

Comments made by the judiciary in the High Court drew attention to the effect of self-representation at the highest level; such effects were, however, much more evident in the family courts.⁷⁶ In 1998, the (then) Chief Justice of the Family Court, Alastair Nicholson, commented on the need for adequate

⁷² *Cachia v Hanes* (1994) 179 CLR 403, [391] per Mason CJ.

⁷³ Gerard Brennan, 'Key Issues in Judicial Administration' (Paper presented at the Fifteenth Annual Conference of the Australian Institute of Judicial Administration, Wellington, September 1996).

⁷⁴ Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

⁷⁵ High Court of Australia, *Annual Report 2002–2003* (High Court of Australia, 2003), 9.

⁷⁶ Australian Institute of Judicial Administration, 'Litigants in Person Management Plans: Issues for Courts and Tribunals' (2001).

representation in the Family Court and the disadvantages to the person who is unrepresented, as well as the negative impact of SRLs upon 'the administration of justice in family law proceedings'.⁷⁷ Nicholson called on the Australian Government to increase funding for legal aid in family law matters to assist the court in managing the problem of the increasing numbers of SRLs.⁷⁸ In 2000, the Future Directions Committee of the Family Court said: '[s]elf-represented litigants are increasingly the new reality and all court services and procedures must address them as a permanent significant and growing user group'.⁷⁹

The Family Court commissioned a range of studies and reports as well as introducing other initiatives and systems designed to manage SRLs.⁸⁰ The main focus of these studies was to track the history of public funding and link it directly to the growth in the number of SRLs which, in turn, causes problems for the judicial system in that it compromises access to justice for the SRLs and affects the efficiency of the courts. The conclusion of these study and report authors was that 'a greater investment in legal aid funding will result in cost savings to the court system'.⁸¹

While the comments by the judiciary and the findings in the studies demonstrated an awareness of the difficulties SRLs cause in the family law system, there was no acknowledgement that the court system itself, in its complexity, formal language, and complicated rules and procedures, created problems for SRLs.⁸² Moreover, the judiciary looked to ways of reducing the

⁷⁷ Nicholson, 'The State of the Court', above n 40, 9, 17; *T & S* [2001] FLC 93-086; Nicholson, 'Australia's Experience' above n 40, 820.

⁷⁸ Nicholson, 'The State of the Court', above n 40, 9.

⁷⁹ Family Court of Australia, *Future Directions Committee Report* (July 2000), 22.

⁸⁰ Dewar, Smith and Banks, above n 1; Family Court of Australia, *Future Directions Committee Report*, *ibid* 22; also see 'Commonwealth Priorities and Guidelines for Legal Assistance in respect of matters arising under Commonwealth Law', Attorney-General's Department, Access to Justice Division, Civil Justice and Legal Services Group; above n 14; Law Council of Australia, *Erosion*, above n 2; Dewar, Giddings and Parker, above n 14.

⁸¹ Dewar, Smith and Banks, above n 1.

⁸² Harry Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, HMSO, 1995), 119; Webb, above n 58; Faulks, above n 58.

numbers of SRLs by suggesting increases in legal aid funding which would ensure that they were represented, rather by reforming the court system.

Although it cannot be proven that the 1997 changes to legal aid funding were directly and solely responsible for the high proportion of people appearing unrepresented in the Family Court, anecdotal evidence and research by the Family Law Council ('FLC') and the ALRC suggest that lack of access to legal aid was one of the major reasons for the high numbers of SRLs and that the Family Court was bearing the burden of the increase. The issue for the court was how to deal with SRLs in light of the economic reality of the restrictions on legal aid funding.

(i) Judiciary calls for the introduction of a duty lawyer in the Family

Court: *Sajdak and Sajdak*

Beyond the Family Court's research into the 'problem' of SRLs and how to deal with their swelling numbers, the judiciary made comment on the effect of legal aid cuts resulting in people representing themselves at trial. More significantly for the current study, the Full Court proposed that a duty lawyer service such as that which operated in the Magistrates' Court for criminal matters be introduced into the Family Court. This proposal assumed benefits which the court considered the duty lawyer could provide.

As early as 1992, the Full Court of the Family Court *In the Marriage of Sajdak*,⁸³ having given its decision, commented about the 'problems of litigants in person' and 'the fact that legal aid authorities are unable or unwilling to provide

⁸³ *Sajdak and Sajdak* (1993) FLC 92-348. It is notable that these funding cuts required LACs to impose stringent means tests and quotas on family law services. The Law Council noted that the incomes means tests of five of the LACs' incomes means tests were set at or below the Henderson Poverty index and that applying more stringent tests would exclude 'some of society's most needy from accessing justice' and a stricter merits test 'would result in a reduction in assistance for serious and worthy matters'. PwC, Economic Value, above n 37, 15.

sufficient aid in family law matters'.⁸⁴ These comments were reported in the judgment as 'remarks of a more general application'.⁸⁵

In *Sajdak*, the Full Court dealt with an appellant wife whose solicitors ceased to act for her on the day of the hearing at first instance. The wife was unable to speak English and relied on an interpreter. She did not make an application for an adjournment because she did not understand the procedures. She was again unrepresented at the appeal and merely put it to the court that she had been denied a fair trial. The appeal was allowed and a new trial was ordered.

The Full Court described the difficulties for the court when an SRL was involved. It said that the court 'cannot perform that role [to decide cases] and retain the confidence of litigants if it is proffering advice to one side or another'.⁸⁶ Their Honours CJ Nicholson, Nygh and Purdy JJ commented on the wife's situation: 'we think that the time has come to call into question the continued diminution of aid to parties in family law matters'.⁸⁷ The Full Court went on to say that:

'at the very least, an independent source of legal advice in the form of a duty lawyer should be available to such people in all registries, and the obvious bodies to provide this service are either the Government, or Legal Aid Commissions acting alone or in co-operation with the legal profession'.⁸⁸

This was the first call in a judgment for a duty lawyer to be made available for SRLs in the Family Court. The Full Court's comment may be seen in the light of the High Court decision in *Dietrich v The Queen* ('*Dietrich*') the previous year.⁸⁹

⁸⁴ *Sajdak and Sajdak* (1993) FLC 92-348 [19].

⁸⁵ *Ibid.*

⁸⁶ *Ibid* [22].

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ In *Dietrich v The Queen* (1992) 177 CLR 192; 109 ALR 385, 397, Mason CJ and McHugh J acknowledged that if an accused is unrepresented in a serious offence, the matter may be adjourned indefinitely to prevent an unfair trial, and that this could result in reordering legal aid practices and priorities. The criminal law duty lawyer scheme was introduced into courts of summary jurisdiction, the Magistrates' Court and District Courts as part of the government program to establish LACs in 1974. The scheme did not operate in the Supreme Court; also

The majority in *Dietrich* referred to a right to an adjournment until full representation was available in serious criminal cases. The issue in *Sajdak* was similar to that in *Dietrich*, in that the court considered an injustice occurred because the SRL did not understand they could seek an adjournment. An analogy can be drawn in the family law context using *Dietrich* to demonstrate that there can be unfairness to an unrepresented litigant. The significance of *Dietrich* is that, as there cannot be perpetual adjournments for the accused to secure legal advice, the court's decision placed indirect pressure for legal aid to provide representation in serious criminal matters. This led to a shift in government funding to provide additional resources to criminal law legal aid, which in turn drained family law. This shift in resourcing had both positive and negative elements for family law in relation to children's matters where the lack of representation can have implications as serious as the deprivation of liberty in criminal law. The consequence of *Dietrich* is that it indirectly drove the right to representation in criminal law, whereas in family law it did not extend to representation but put the emphasis on duty lawyer services to fill the gap. The call by the Full Court in *Sajdak* for a duty lawyer may have been in this limited context, and may not have extended to a request for full representation.

The Full Court made it clear that while it had obligations to ensure SRLs received a fair trial, it also needed to maintain impartiality and avoid the perception of bias. The court was concerned that by providing SRLs with legal assistance, the other parties might consider SRLs were getting free information and help while they were paying their lawyers.⁹⁰ However, as a party does not have a right to legal representation⁹¹ and there is no assumption that, just because a party is not represented, the court's processes are not fair, it may not be assumed that if every litigant received legal aid and was represented, the outcomes might be better. It may be inferred in *Sajdak's* case that the court is saying that if SRLs had the assistance of a duty lawyer, there might be some

see Ronald Sackville, *Commission of Inquiry into Poverty: Legal Aid in Australia*, Law and Poverty Series, (Australian Government Printing Service, Canberra 1975), 5.9.

⁹⁰ *Sajdak and Sajdak* (1993) FLC 92-348 [22].

⁹¹ *Cachia v Hanes* (1994) 179 CLR 403.

benefit to the SRL in understanding they had the option to adjourn the proceedings; and that, in itself, represents a fair outcome.

The literature shows that it may not be possible to deal with SRLs by means of one particular approach, as SRLs cannot be categorised as one identifiable class of litigant and the reasons why people appear in the courts unrepresented are many and complex.⁹²

(ii) Other court initiatives to deliver fairness to SRLs – judicial guidelines:

Johnson & Johnson

Apart from calling the Government's attention to the problem, the judiciary considered ways in which the courts could better manage the issue of people representing themselves. The judiciary sought to develop their own approach to how to deal with litigants in person.

The debate involved, on the one hand, proponents that the court should maintain impartiality through passivity to avoid any perception by the other party that an SRL was receiving additional help from the court;⁹³ and, on the other hand, those arguing that the court needs to be more flexible in its approach and accommodate the needs of SRLs, with the judicial officer departing from the more traditional role and having a more active involvement in a hearing by adopting a more inquisitorial style.⁹⁴ There was some support from judges for a new approach to civil litigation.⁹⁵

⁹² Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Literature Review* (Australian Centre for Court and Justice System Innovation, Monash University, 24 May 2012). This Review comprehensively deals with the literature on the reasons for and impact of self-representation.

⁹³ Australian Institute of Judicial Administration, *Litigants in Person Management Plans*, above n 76; *Cachia v Hanes* (1994) 179 CLR [415].

⁹⁴ Geoff L Davies, 'Justice in the 21st Century' (2000) 10 *Journal of Judicial Administration* 50. Davies comments that judges who are 'concerned about the best use by the public of the scarce resources of courts' are 'adopting some of the civil systems and using more inquisitorial methods' to manage and conduct trials.

⁹⁵ Harry Woolf, *Access to Justice*, above n 82, 6: 'Adversarial ideology has failed ... The less, individualistic, more communitarian ethic that is reflected in the transformation should be recognised and encouraged'.

The question of how the judiciary should handle SRLs to ensure that they received procedural fairness while maintaining judicial neutrality was addressed in 1997 by the Full Court of the Family Court in *Johnson & Johnson*, which set out guidelines and principles for the court.⁹⁶

This case involved an appeal by the husband against orders made by Justice Mushin that the husband was liable to pay lump sum child support to the wife. The husband had been represented at first instance whereas the wife had not. Both parties were unrepresented at the appeal. The husband argued that the trial judge had, in speaking with the wife directly, established that she sought orders that were not in her application and proceeded to make such orders.

To assist judges in dealing with SRLs and ensure that the proceedings were fair, the Full Court in *Johnson* set out eight guidelines for the judiciary to follow. It took the view that the judge could give procedural advice about the conduct of the hearing, but could not offer legal advice as to what constitutes evidence nor restate questions in cross-examination to adhere to the rules, because that might give rise to the other party believing that the court gave some advantage to a litigant in person.

The emphasis for the court in *Johnson* therefore was that the court could not maintain its impartiality if it provided legal advice to SRLs. The court's approach followed from an implicit recognition that it was operating under an adversarial system and that the involvement of a litigant in person neither diminished the rules of evidence nor should compromise the principle that it was the primary responsibility of the parties to present and argue their case. Dewar, Smith and Banks commented on the guidelines in *Johnson* that 'the perceived tension between judicial impartiality and the need to help litigants in person meant that a number of judges and registrars thought that their role as presiding officer was compromised by the presence of a litigant in person'.⁹⁷

⁹⁶ *Johnson & Johnson* (1997) FLC 92-764.

⁹⁷ Dewar, Smith and Banks, above n 1, 60.

Dewar, Smith and Banks' report points out that the Full Court's guidelines in *Johnson & Johnson* may seem at odds with the court's case management plans and rules of the court, which emphasise the court's obligations to ensure that the matters proceeded through the court efficiently and without undue delay. As a way forward, the report recommended better coordination at the local level of information regarding support services such as court network systems, duty lawyers or support programs when needed by litigants in person.⁹⁸

The Family Court's research into self-representation looked at the extension of the duty lawyer service to all family courts as an important initiative.⁹⁹ Findings by Dewar, Smith and Banks, based on interviews with judges, judicial registrars and registrars in a number of family court registries, revealed a need for legal advice and information about procedures and that duty lawyers would be 'an appropriate source of this advice',¹⁰⁰ but noted that while 'some registries have excellent support from duty solicitors, in others there is no duty solicitor scheme at all'.¹⁰¹ The authors, recognising the discrepancy this situation created in providing all SRLs with access to justice, cited Lord Woolf's principal recommendation that 'court-based or duty advice and an assistance scheme (be) funded by legal aid'.¹⁰² However, the obiter dicta in *Johnson* were consistent with comments made in other courts¹⁰³ and in a family law matter decided by the High Court which stressed that the principle of the impartiality of the court was 'of fundamental importance [so] that the public should have confidence in the administration of justice'.¹⁰⁴

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid n 1.

¹⁰¹ Ibid n 1, 3.

¹⁰² Ibid above n 1, 23, citing Woolf, above n 81.

¹⁰³ *Livesey v New South Wales Bar Association* (1993) 151 CLR [228], [293], per Mason, Murphy, Brennan, Deane and Dawson JJ.

¹⁰⁴ *Re Watson; ex parte Armstrong* (1976) 136 CLR [248], [262], per Barwick, CJ, Gibbs, Stephen and Mason JJ.

(iii) Refining judicial guidelines: *Re F: Litigants in Person Guidelines*

In 2001, the Full Court of the Family Court in the case of *Re F: Litigants in Person Guidelines*¹⁰⁵ dismissed an appeal that the trial judge had breached the guidelines in *Johnson & Johnson*. The Full Court took the opportunity to revisit the *Johnson* guidelines and examine the judge's role when dealing with litigants in person.

The court looked at the expectations of SRLs and said that it 'should be recognised that persons who represent themselves are almost always at a disadvantage in legal proceedings' as 'it is simply not possible to create a level playing field where one party is represented by a professional and the other is not'.¹⁰⁶

In refining the *Johnson* guidelines, the Full Court commented:

The decision in *Johnson* affords implicit recognition to the problematic position of this court operating under an adversarial system, in dealing with litigants in person. Whilst the court has in some respects moved away from a traditional adversarial model, for example through its emphasis upon case management and primary dispute resolution, it is nevertheless a superior court of record, often concerned with complex procedures requiring specific drafting and advocacy skills and an understanding of the rules of evidence. ... We think that guidelines must not risk compromising the neutrality of the court or the perception of the court's neutrality. ... However ... the obligation to provide a fair trial has principal significance for a court of law and it must take some steps to assist a litigant in person in order to do justice between the parties with an eye to the reality of the prevalence and diversity of litigants in person in this jurisdiction.¹⁰⁷

The approach in *Re F* was consistent with the views expressed in the literature, with specific reference to the Family Court, that it was particularly difficult for the

¹⁰⁵ *Re F: Litigants in Person Guidelines* [2001] FamCA 348.

¹⁰⁶ Ibid [242]; Random House Dictionary.com/Unabridged: 'level playing field'. This term means a state of equality; an equal opportunity. Black's Online Law Dictionary (2nd ed) defines the term as 'All competitors follow the same rules to get equal opportunity to compete, regardless of size or financial strength', <<http://www.thelawdictionary.org>>.

¹⁰⁷ *Re F: Litigants in Person Guidelines* [2001] FamCA 348 [242].

court to distinguish giving legal advice from giving procedural assistance, and that there could be circumstances in which it was necessary for the court to give legal assistance if it aided in the overall requirement for the court to conduct a fair trial.¹⁰⁸ The Full Court said that:

[T]here can be circumstances where the requirement to conduct a fair trial requires a judge to give assistance of a legal nature to a litigant in person, even though such assistance may risk the appearance of impartiality and neutrality from the perspective of the other side.¹⁰⁹

The court established that a judge has a duty to ensure that all parties, including SRLs, receive procedural fairness, and that a judge can legitimately help SRLs while maintaining impartiality and ensuring a fair trial. It stated that the court had wide discretion in managing a trial, that it was within the judge's discretion to assist SRLs, and that it was not appropriate for an alleged breach of the guidelines to form a ground of appeal.¹¹⁰ It added a further guideline which gave effect to the judicial officer taking an active and inquisitorial role 'in the interests of justice and [if] the circumstances of the case require it'.¹¹¹ The court noted that the list of guidelines was not exhaustive and 'there may well be other interventions that a judge may properly make' to inform himself or herself of the

¹⁰⁸ Dewar, Smith and Banks, above n 1, 2; Also see *Re F: Litigants in Person Guidelines* above n 105, [348] where the Full Court of the Family Court cited the Australian Institute of Judicial Administration, *Litigants in Person Management Plans*, above n 76; Andrew Rogers, 'The Managerial or Interventionist Judge' (1993) 3 *Journal of Judicial Administration* 96; Family Law Council, *Litigants*, above n 1, [1.48].

¹⁰⁹ *Re F: Litigants in Person Guidelines* [2001] FamCA 348, [224].

¹¹⁰ These principles were reaffirmed in *Mulholland v Mulholland* [2007] FamCA 210, where the appellant father argued that the trial judge failed to outline equally to both parties the process and procedure of giving evidence and being cross-examined, relying on the guidelines in *Re F*. The Full Court said, 'We do not think it is appropriate for the guidelines to be used in this way as there may well be good reason in particular cases to depart from some of the guidelines, but always remembering the Court's obligation to provide procedural fairness and a fair trial'. The Court found 'Nothing to suggest there was any unfairness or prejudice in the differential between the instructions ... The father generally misconceived the appeal process and principles'. *Mulholland* reaffirmed the principles set out in *Re F* above n 104 at 229–230 by restating the wide discretion of the trial judge which extended to the assistance offered a litigant in person.

¹¹¹ *Re F: Litigants in Person Guidelines* [2001] FamCA 348, [251].

facts of a matter or provide assistance without giving rise to the apprehension of perceived bias.¹¹²

The guidelines in *Re F* reflected reforms to the *Family Law Act 1975* (Cth) made in 1995, which provided that it was the responsibility of the court to make decisions in relation to children, having regard to what was in the best interests of the child,¹¹³ but also to conduct a full and complete inquiry into all the relevant issues and to avoid unnecessary and restrictive procedures.

E Meeting the needs of SRLs

(i) Family Court – Management Plans

The Family Court continued to look to administration and efficiency measures to provide services to SRLs. In recognition that there needed to be consistency in the courts' approach to SRLs, in 2001 the Australian Institute of Judicial Administration ('AIJA'), following earlier commentators,¹¹⁴ recommended that all courts have Litigants In Person Management Plans ('LIPMPs') to improve 'the efficiency of courts and tribunals, in terms of reduced time and resources dealing with litigants in person, and enhancing public access to the courts and the judicial system'.¹¹⁵ The AIJA's report summarised the reports, papers and literature on the issues confronting courts and tribunals with respect to SRLs and their impact on resources, and provided a range of information and ideas for courts and tribunals to draw on in formulating their own management plans to maintain judicial independence and deal with SRLs. The report proceeded on the assumption that these plans must work within the adversarial system and that persons appearing self-represented:

¹¹² Ibid [253].

¹¹³ *Family Law Act 1975* (Cth), s65E, which provides that the child's best interests is the paramount consideration in making a parenting order.

¹¹⁴ Australian Institute of Judicial Administration, 'Courts and the Public', Research Report (June 1998) 166; Family Law Council, *Litigants*, above n 1.

¹¹⁵ Australian Institute of Judicial Administration, *Litigants in Person Management Plans*, above n 76.

[S]hould be aware they face difficulties which may prejudice the proper presentation of their case. It should not be thought that the court system could operate effectively or efficiently unassisted by barristers and solicitors in most cases.¹¹⁶

The AJJA report acknowledged that more needed to be done beyond courts having an LIPMP in place to minimise the problems for and created by SRLs, and to ensure that the court could run efficiently.¹¹⁷ It looked to other ways SRLs could be assisted in a hearing, suggesting duty lawyer schemes, and noted the initiative in the Dandenong Family Court where Legal Aid Duty Lawyers attended one day a week.¹¹⁸

It was clear that the rules of the court conferred discretion on a judge to make decisions in relation to procedural fairness, and that case management guidelines allowed the judge greater involvement in managing the proceedings. A comment by Chief Justice French in a 2009 case clearly sets out how the judge can work within the adversarial system to balance efficient case management on the one hand and the SRL's right to be heard on the other:

[The] adversarial system [is] qualified by changing practice. But that is not a system which today permits disregard of undue delay [which] can undermine confidence in the rule of law. To that extent, its avoidance, based on a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources.¹¹⁹

The Full Court of the Family Court recently confirmed this approach. In *Collins & Ricardo*, the judges referred to the 'dilemma' of balancing efficient case management with providing procedural fairness to SRLs:

[T]he rules and conventions governing [judicial practice] are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial

¹¹⁶ Ibid.

¹¹⁷ Ibid 6: 'It is not envisaged that a management plan will eliminate all the problems experienced by the courts and tribunals in relation to litigants in person'.

¹¹⁸ Ibid 11, 13.

¹¹⁹ *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 23.

level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.¹²⁰

(ii) Simplified forms and procedures

The Family Court also introduced simplified forms and procedures in an attempt to improve its efficiency. Its initiatives in terms of simplified procedures, self-help services, judicial guidelines and management plans, were cost-effective ways of providing a level of access to justice to SRLs and improving the court's efficiency.¹²¹

Putting in place such strategies suggests an assumption that these initiatives are necessary and useful to SRLs, and supports the court's approach to dealing with SRLs. However, research into online information and self-help resources indicates that they reflect the providers' rather than the users' needs. The provider may measure the success of these services by the numbers who access them. There is no capacity to evaluate how effective the services are and whether they benefit the user. The self-help services also assume that the user has the ability and capacity to access, understand and, to some extent, know what they are looking for, in order to make effective use of them.¹²² Research suggests that self-help services for SRLs may be complementary to, but are not a substitute for, face-to-face interaction with a lawyer.¹²³ Moreover, while some simple matters such as divorce could be dealt with by Do It Yourself ('DIY') kits, SRLs involved in more complex matters needed a lawyer to explain 'what the hell is going on in the forum they are going to find themselves in'.¹²⁴

¹²⁰ *Collins & Ricardo (No 2)* [2015] FamCAFC 77, [79] per Strickland, Murphy and Tree JJ.

¹²¹ Faulks, above n 58: 'Since the publication of Litigants in Person Management Plans, courts in Australia have increasingly undertaken initiatives designed to assist (SRLs) and to ease their impact on the court system'.

¹²² Senate Legal and Constitutional References Committee, above n 2; see Chapter 10: Self-Represented Litigants, citing Hunter and Giddings, Griffith University, Submission 24, 5.

¹²³ Senate Legal and Constitutional References Committee, above n 2.

¹²⁴ *Ibid.* See Chapter 10: Self-Represented Litigants, 18–204, citing Mark Woods, Law Institute of Victoria, Committee Hansard, 12 November 2003, 29–30.

In 2011, Sackville revisited the issue of access to justice raised in his 2002 report.¹²⁵ His tone was more critical than in the earlier report, in particular of ‘the fragmented approach to access to justice’. Following an extensive review of recent research, Sackville concluded that:

[D]espite the procedural and administrative reforms of the last several decades ... there will always be a substantial gap between the ideals implicit in the concept of access to justice and the ability to realise those ideals, given the limitations on available resources.¹²⁶

Sackville specifically referred to the Productivity Commission’s draft report in 2010,¹²⁷ citing the (then) Chief Justice of New South Wales’ description of it as a ‘one size fits all’ approach to managing the court system.¹²⁸ The criticism was that the report considered every aspect of legal services from an economic perspective. Sackville lamented ‘the pervasive influence of economics, the lifeblood of which is statistical information and forecasts, no matter how spurious, the underlying assumptions’.¹²⁹

Sackville clearly did not agree with the Productivity Commission’s approach, stating that ‘simplistic quantitative measures of this kind cannot adequately assess the “performance” of courts responsible for doing justice to all people according to law’,¹³⁰ but credited such reports for drawing attention to ‘access to justice’ issues. His conclusion was that rather than ‘ad hoc, repetitive and

¹²⁵ Ronald Sackville, ‘Access to Justice: Assumptions and Reality Checks’ (Paper presented at the Law and Justice Foundation of NSW’s Access to Justice Workshop, NSW Parliament House, Sydney, 10 July 2002); also see Sackville’s earlier report *Commission of Inquiry into Poverty*, [5.9], above n 88.

¹²⁶ Sackville, above n 21, 232–233.

¹²⁷ Steering Committee for the Review of Government Service Provision, *Report on Government Services 2010*, Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, Pt C [7.37] and [7.13]. The clearance indicator is measured by dividing the number of finalisations in the reporting period by the number of lodgements in the same period.

¹²⁸ Sackville, above n 21, 234 citing James Spigelman, ‘The “New Public Management” and the Courts’ (2001) 75 (12) *Australian Law Journal* 748 at 750–751.

¹²⁹ *Ibid* 233.

¹³⁰ *Ibid* 234.

ineffectual inquiries [there should be more] rigorous empirical studies evaluating programs and charting their progress over time'.¹³¹

The Law Council endorsed the Productivity Commission's findings that legal assistance services are inadequately funded and that a new funding model with national priorities for the provision of legal assistance services was needed.¹³² This view complemented the Law Council's oft-stated position that the Government should make more funds available for legal aid. The Law Council had a vested interest in some of the recommendations made by the Productivity Commission as they widened the scope for services being open to competition, thereby justifying legal costs as market-based.

Sackville's review of the recent research was particularly germane to this thesis. It offered an understanding of how commentators sought to deal with the difficulties involved in attempting to resolve the theoretical perspectives of what access to justice means 'in the political and legal lexicon'¹³³ within the economic reality that full legal representation may be out of reach of many people accessing the family courts. It also confirmed research which recognised a need to move away from the adversarial model in the context of family law¹³⁴ and the

¹³¹ Ibid.

¹³² Law Council of Australia, 'Response to the Productivity Commission Report' (Media Statement, 4 December 2014), <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediastatements/1416_--_Release_of_the_Productivity_Commission_Report.pdf>.

¹³³ Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85 at 86.

¹³⁴ John Faulks, 'A Natural Selection? The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia' (Paper presented at the Australasian Institute of Judicial Administration Non-Adversarial Justice, Melbourne, May 2010); Peter Rose, 'The Road to Less Adversarial Trials and Beyond' (2007) 21 *Australian Journal of Family Law* 232; Stephen O'Ryan, 'The Less Adversarial Trial: the Lighter, More Contemporary and More Fuel Efficient Vehicle' (Paper presented at the 24th Australian Institute of Judicial Administration Annual Conference, Adelaide, September 2006) citing Family Court of Australia, 'Self-Represented Litigants: A Challenge—Project Report December 2000–December 2002' (Family Court of Australia, 2003) and Hunter, above n 70, 171. Hunter supports the less adversarial approach as one which accommodates SRLs rather than expecting them to fit in with the court system; Harrison, *Finding a Better Way*, above n 39.

recommendation that lawyers provide limited scope retainers or unbundled legal services.¹³⁵

Sackville noted that the comments he made in his 2002 paper still held true: that people who represent themselves experience difficulties with the processes of the court and cause frustration and delay which has an impact on all those involved in the dispute. He considered that to assist SRLs to participate in proceedings in a meaningful and fair way, the court might have to give them some assistance—although the court cannot give assistance to an SRL in such a way as to conflict with its role as an impartial adjudicator or to create a perception of bias, such that the other party considers an injustice has occurred.¹³⁶ Sackville also noted that regardless of the introduction of new systems and processes, the court had not sufficiently resolved how to deal with this tension, and the numbers of SRLs remained consistently high.

In its 2004 report on access to justice, the Senate Legal and Constitutional Affairs References Committee acknowledged that the Family Court's simplification of its processes and procedures and the provision of information online was an important part of assisting SRLs. However, the Committee also considered that:

[U]ndue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist self-represented litigants in resolving their matters. Such evaluations must focus on the extent to which they contribute to resolution of the real problem and not merely the user's satisfaction with those services.¹³⁷

¹³⁵ Productivity Commission, above n 1; Allen Consulting Group, 'Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions' (Final Report, Prepared for the Australian Government Attorney-General's Department, 2014) ('Allen Consulting').

¹³⁶ See *Rajski v Scitec Corporation Pty Ltd* (Unreported, NSWCA, Kirby P, Samuels and Mahoney JJA, 16 June 1986).

¹³⁷ Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice* (Final Report 2004), see Chapter 10: Self-Represented Litigants [10.70], 198.

(iii) Recommendation to create national duty lawyer scheme

The Committee noted comments made by legal service providers that regardless of the benefit of self-help measures introduced by the courts, face-to-face services provided by duty lawyers, while perhaps not a complete solution,¹³⁸ assisted SRLs to be better informed and, if required, to 'better run their case'.¹³⁹ The Committee referred to the newly established pilot duty lawyer scheme established by LANSW at the Parramatta family courts¹⁴⁰ and other submissions which argued for increased funding to enable duty lawyers to assist SRLs in all family law cases.¹⁴¹ It recommended that the Government provide funding to establish duty lawyer services beyond the existing family court registries and that a national scheme be created to provide SRLs with legal services.¹⁴² In coming to that recommendation, the Committee noted the Federal Magistrates Court's ('FMC') description of the existing duty lawyer scheme as 'an essential adjunct to efficient operation of the Court'.¹⁴³

(iv) Federal Magistrates Court initiatives

As the workload of the Family Court was increasing, both in volume and complexity, the Australian Government introduced legislation to establish the FMC in 2000, to balance the workload between the FMC and the FCA.¹⁴⁴ The

¹³⁸ Ibid 129.

¹³⁹ Ibid, citing Legal Aid Queensland, Submission 31, 4 and 22, 198.

¹⁴⁰ Ibid, citing Legal Aid Commission of NSW, Submission 91, 30–31. For further discussion, see J (ii) Pilot program: Parramatta, August 2002 – June 2003.

¹⁴¹ Ibid, citing the Law Society of South Australia, Submission 92, 2; Legal Services Commission of South Australia, Submission 51, 6 and 26; Law Council of Australia, Submission 62, 2; Riverland Community Legal Centre, Submission 11, 4–5.

¹⁴² Ibid. See Chapter 10, Recommendation 57, [10.83]. 'The scheme should offer, at the very least, a duty solicitor capacity in courts of first instance (criminal, civil and family) ... [to provide] assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute', 200.

¹⁴³ The Federal Magistrates Court of Australia, *Annual Report 2001–2002* (Federal Magistrates Court of Australia, 2002) 12.

¹⁴⁴ Senate Legal and Constitutional References Committee, above n 137. The Committee recommended the establishment of the Federal Magistrates Court in 1999 and noted that the Law Council of Australia, the Bar Associations and the Law Societies of Australia expressed opposition to the creation of the court. The concern of these bodies was that there would be two classes of court, the Family Court for the wealthy and the Federal Magistrates Court for the poor and legally aided. Supporters of the court considered it would provide a quicker and

FMC was to be an independent federal court designed to provide simple and easy access to justice for litigants.¹⁴⁵ Its establishment was an example of the Government's commitment to providing accessible and affordable options for the resolution of family law disputes. The Attorney-General referred to the FMC as 'a new culture, with an emphasis on user-friendly, streamlined procedures—especially important for litigants who do not have legal representation'.¹⁴⁶

The creation of the FMC was designed to address the difficulties the FCA was experiencing, problems of increased cost, delay and inefficiency which were inhibiting litigants' access to justice.¹⁴⁷ Its procedures were streamlined and simplified, designed to move matters more quickly through the court's processes.¹⁴⁸ The FMC's wide scope of family law lessened the work of the FCA, which took on more complex matters, particularly those in which children might be at risk.¹⁴⁹ However, the FMC also inherited the FCA's 'new reality' ¹⁵⁰

more efficient service at less cost and therefore improve access to justice for litigants. The Federal Magistrates Court was originally established by the *Federal Magistrates Act 1999* (Cth) and its jurisdiction at inception was conferred by the *Federal Magistrates (Consequential Amendments) Act 1999* which received Royal Assent on 23 December 1999, although the court did not sit until 3 July 2000.

¹⁴⁵ Diana Bryant, 'The Federal Magistrates Service' (2000) 14 (3) *Australian Family Lawyer* 16.

¹⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 1999, 7365 (Daryl Williams, Attorney-General).

¹⁴⁷ Alastair Nicholson and Margaret Harrison, 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' (2000) 24 (3) *Melbourne University Law Review* 756. This article attributed delays in children's matters to amendments to Part VII of the *FLA* in 1996 which 'create a tension between a child's right to contact and the need to protect children from family violence' where a non-resident parent has made an application for contact and allegations have been made against that parent. The article says that this resulted in an increase in applications for parenting orders (see Family Court of Australia, *Orders Sought 1990–91 to 199–2000*). The article also cites the shortage of judges and limitations on the delegation of powers to registrars (*Harris v Caladine* [1991] HCA 9: (1991) 172 CLR 84) which prevented registrars hearing interim matters and extended the time by which matters reached final hearings.

¹⁴⁸ Unlike the FCA, the FMC introduced the need to file an affidavit with an application to enable the court to identify issues in dispute at an early stage; it reduced the number of appearances by fixing hearing dates on the first mention date in the majority of matters and allowing appearances by legal practitioners and SRLs by telephone for mentions, especially in regional or country areas.

¹⁴⁹ The Family Court commenced the Magellan Project, which involved early intervention and special case management of cases involving serious (usually sexual) abuse of children to be dealt with by a designated team of judges. See Family Court of Australia, Submission by the Family Court of Australia to Senate Legal and Constitutional Legislation Committee Appendix A—Federal Magistrates Bill 1999; The Magellan Project (1999), <<http://www.familycourt.gov.au/court/html/attachments.html>>.

¹⁵⁰ See Family Court of Australia, *Future Directions Committee Report* (2000), 22.

of SRLs: a 'permanent, significant and growing user group'¹⁵¹ which courts needed to accommodate and assist.¹⁵²

In its first Annual Report, the FMC noted that it had established a Self-Represented Litigants Committee which was already formulating plans based on the recommendations of the Litigant In Person Management Plan. It referred to initiatives of the FCA and indicated it would 'utilise the resources and networks already assisting self-represented litigants, while targeting material to facilitate the specific needs of litigants appearing in the Federal Magistrates Court'.¹⁵³ In its second Annual Report, the FMC indicated that '[s]elf-represented litigants continue to comprise a large section of people appearing in the court, with both parties being represented in less than 65 per cent of family law matters finalised in the court'.¹⁵⁴ The court said that it now had the same Casetrack management system for family law matters as that used by the FCA, which would assist the court to monitor and direct its workload to areas of most need. It mentioned initiatives the court had undertaken to simplify procedures and make court services more accessible.¹⁵⁵ At the same time, the court's jurisdiction in family law property matters was increased from \$200,000 to \$700,000, which resulted in more cases coming before the court.¹⁵⁶

Recognising that the FMC had very quickly inherited the numbers of SRLs which the Family Court had been experiencing,¹⁵⁷ the FMC conducted its own studies into the needs of SRLs and how best these might be met by putting in place strategic services.¹⁵⁸ The Self-Represented Litigants Committee

¹⁵¹ Ibid.

¹⁵² Nicholson and Harrison, above n 147, 756.

¹⁵³ The Federal Magistrates Court of Australia ('FMCA') *Annual Report, 2000–2001* (Federal Magistrates Court of Australia, 2001), 20, 50.

¹⁵⁴ FMCA, *Annual Report 2002–2003* (Federal Magistrates Court of Australia, 2003).

¹⁵⁵ FMCA, *Annual Report 2002–2003* (Federal Magistrates Court of Australia, 2003), 12.

¹⁵⁶ FMCA, *Annual Report 2002–2003* (Federal Magistrates Court of Australia, 2003), 10. This measure came into force on 1 January 2002.

¹⁵⁷ FMCA, *Annual Report 2003–2004* (Federal Magistrates Court of Australia, 2004). This report notes that during that financial year, approximately 21% of applications filed in the FMC for children or property and 54% of applications for contravention did not have a.

¹⁵⁸ Melanie Dye, 'An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court' (Canberra: Federal Magistrates Court of Australia, October 2004).

continued to report that the court needed to ensure the court's rules, practices, forms and procedures were simple and understandable, and that this information be readily available to SRLs both online and in person.¹⁵⁹

By 2003–2004, the FMC's report on SRLs was more detailed in identifying problems which the FCA had been experiencing. Matters involving SRLs were likely to require a hearing rather than reaching a settlement through negotiation; SRLs required more time and created more delays than litigants who were represented by a lawyer; the court could not 'step into the role of legal adviser' and needed to maintain its neutrality.¹⁶⁰ As the FCA had done, the FMC established a 'Self-Represented Litigants' Project' which provided statistics on the number of people representing themselves at different stages of their proceedings. The court's Self-Represented Litigants' Committee reviewed the FMC's court publications, website and assistance programs and developed new simplified fact sheets and forms which avoided 'legal jargon'.¹⁶¹

During 2003–04, the court conducted a project titled 'A day in the life of a self-represented litigant' which sought feedback from 71 SRLs and three independent consultants who posed as SRLs. The report was released in October 2004 as an evaluation of services for SRLs in the FMC.¹⁶² The court indicated that the report provided an insight into the needs of SRLs and, more importantly, the areas in which the court needed to improve its service delivery to them. The court committed to implementing the 12 recommendations made in the report, including, inter alia, the continuing review of FMC material produced for SRLs and the development of 'self-help kits'.¹⁶³

The reforms introduced by the FMC were in line with initiatives already in place in the FCA. They were driven by the acceptance that many SRLs' expectations

¹⁵⁹ FMCA, above n 154, 50.

¹⁶⁰ FMCA, above n 155, 14.

¹⁶¹ Ibid 55.

¹⁶² Dye, above n 158. The report was helpful to the current study in identifying the needs of SRLs and areas where SRLs consider more could be done, and in providing a worthwhile methodology for seeking SRLs' views.

¹⁶³ FMCA, above n 155, 40.

of the court system were a 'poor reflection of the reality of how the court system operates'.¹⁶⁴ Initiatives to address the needs of SRLs were in line with the literature, which suggested that SRLs are likely to be disadvantaged in the adversarial system¹⁶⁵ and achieve worse outcomes than those who are legally represented.¹⁶⁶ They confirmed the challenges previously mentioned in the literature as experienced by the Family Court and mentioned in case law,¹⁶⁷ that the legal system needed to adapt in order to deal with the reality of SRLs¹⁶⁸ and to introduce systems and court procedures which were clear and understandable, to ensure that any disadvantage SRLs were under were at least mitigated, if not eliminated,

In summary, the literature, reports and initiatives of the courts indicate an acceptance that, regardless of any other measures put in place to assist SRLs, the family law duty lawyer scheme, even in its then limited scope was an important and necessary adjunct to the raft of initiatives designed to address the needs of SRLs and improve the efficiency of the courts.

(v) Family law reforms - 2006

In 2006, wide-ranging reforms to the family court system were introduced¹⁶⁹ which were based on the 2003, House of Representatives Standing Committee

¹⁶⁴ Elizabeth Richardson, *Self-Represented Parties: A Trial Management Guide for the Judiciary* (Melbourne County Court of Victoria, 2004); Gamble and Mohr, above 43.

¹⁶⁵ Australian Law Reform Commission, *The Unrepresented Party*, above n 48; Law Council of Australia, *Erosion*, above n 2; Dye, above n 158; Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, New Zealand, July 2009).

¹⁶⁶ Woolf, above n 82; Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Department of Constitutional Affairs Research Series 2/05 (United Kingdom, 2005), 82.

¹⁶⁷ *Rajski v Scitec Corp Pty Ltd* (Unreported NSWCA, 16 June 1986) per Samuels JA (cited with approval in *Minogue v HREOC* (1999) 84 FCR 438).

¹⁶⁸ FMCA, above n 155, 14 'as much as 70% of applicants are not represented by a lawyer'.

¹⁶⁹ The *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) introduced amendments to the *Family Law Act 1975* (Cth) and changes to the family law system which were aimed to bring about a 'cultural shift' in the management of children's matters for separating parents; see Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (2009) Melbourne: Australian Institute of Family Studies, (Kaspiew et al 2009);

on Family and Community Affairs paper, 'Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation'.¹⁷⁰ The reforms aimed to make it 'fairer and better for children'.¹⁷¹ The report identified a number of features of the existing systems that caused problems, in particular, for SRLs. These included unclear entry points into the family law system,¹⁷² 'a bewildering and largely uncoordinated range of related services for separating parents (previously likened to a "maze")',¹⁷³ and a need to introduce changes to the legislation and create services to promote shared parental responsibility 'and the continuing involvement of both parents in children's lives (subject to the child's best interests)'.¹⁷⁴

In 2005, the Australian Government responded to the House of Representatives report¹⁷⁵ and, in 2006, made amendments to the *Family Law Act 1975*, and introduced new legislation, the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, which brought wide-ranging reforms designed to

Commonwealth Attorney-General's Department, *The New Family Law System: Summary of the Main Changes and how they Affect Family Relationship Practitioners* (July 2006) 366).

¹⁷⁰ House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (December 2003).

¹⁷¹ Ibid.

¹⁷² Ibid. For example, the FCA and the FMC had separate registries and different forms for each part of the process.

¹⁷³ Ibid. This reference comes from the earlier report.

¹⁷⁴ Commonwealth Attorney-General's Department, *The New Family Law System: Summary of the Main Changes and How they Affect Family Relationship Practitioners* (July 2006) 366, 2; also see Kaspiew et al 2009 above n 169, 11 noting that the child's "best interests" remain the overriding criterion (s60CA), citing Richard Colin Chisholm 'Making it work: The *Family Law Amendment (Shared Parental Responsibility) Act 2006*' *Australian Journal of Family Law*, 21(2), 143-172.

¹⁷⁵ House of Representatives Standing Committee on Family and Community Affairs 'Inquiry into Child-Custody Arrangements in the Event of family Separation', *A New Family Law System Government Response to Every Picture Tells a Story* (June 2005), Response to the Report of the Commonwealth of Australia, Canberra, 12, <www.aph.gov.au/house/committee/fca/childcustody/govtresponse.pdf>. This report was responsible for introducing the amendments to the *FLA* which came into effect in 2006. The amendments are contained in the *Shared Parental Responsibility Act 2006 (SPR Act 2006)*. They include the establishment of the Family Relationship services and the requirement for parents to attend family dispute resolution before filing an application, except in certain circumstances, including where there are concerns about family violence and child abuse (s60I (9)); the introduction of a presumption in favour of equal shared parental responsibility (*SPR Act 2006* s61DA, see also s60B (1) (a), s60CC (2) (a)). The language of the *FLA* was also changed, moving away from 'contact' to 'meaningful involvement' (*SPR Act 2006* s60B (1) (a) and rather than a 'residence' parent, a child will 'spend time' with each parent (*SPR Act 2006* s60B (2) (b)).

improve people's experiences in relation to parenting disputes. It is outside the scope of this study to discuss the 2006 reforms in detail;¹⁷⁶ but it will look at the provisions which gave legislative support for a less adversarial court process in children's matters and discuss its relevance to SRLs.

The perceived need to adopt a less adversarial approach is of interest to this thesis as it indicates that the number of people appearing without legal representation posed a challenge to the notions of natural justice and due process that underpin Australia's justice system. The courts recognised that, despite innovations in case management and more streamlined procedures, legal proceedings were still adversarial, and this was having a damaging effect on how matters progressed through the court generally.¹⁷⁷ In effect, this was confirmation of research by Dewar, Smith and Banks in 2000 and others that SRLs proceeding through the family courts could be disadvantaged and might not get a fair hearing.¹⁷⁸

The nature and importance of the adversarial system, which requires that each party is represented and therefore on equal terms and able to present their case to an impartial judge, had been affirmed by the High Court in *Armstrong v Watson* in 1976.¹⁷⁹ The justification for the system is premised on the assumption that truth will be found and fairness prevails if both parties are represented in proceedings.¹⁸⁰ However, the family courts were attempting to reflect a different image, one based on a philosophy of the 'helping court' which was about fairness for all concerned.¹⁸¹ The Family Court had conducted its own research in relation to changes to the adversarial system¹⁸² and had

¹⁷⁶ For a comprehensive review of the 2006 reforms see Kaspiew et al (2009), above n 169, 8; Commonwealth Attorney-General's Department, *The New Family Law System*, above n 174.

¹⁷⁷ Senate Legal and Constitutional References Committee, above n 135; see Chapter 10: Self-Represented Litigants, [10.44], 47.

¹⁷⁸ Dewar, Smith and Banks, above n 1; also see Catherine Caruana, 'Meeting the Needs of Self-Represented Litigants in Family Law Matters' (2002) 62 *Family Law Matters*.

¹⁷⁹ *R v Watson; ex parte Armstrong* (1996) CLR 248.

¹⁸⁰ Davies, above n 94, 5.

¹⁸¹ Rhoades, above n 6, 17; Allan Consulting, above n 6.

¹⁸² Davies, above n 94, 50, 51; Linda Dessau, 'Helping Separated Parents to Achieve Good Outcomes: New Directions in the Family Court of Australia' (Paper presented at the 9th AIFS Conference, Melbourne, 9–11 Feb 2005).

started to take a less adversarial approach when dealing with children's matters. This had implications for SRLs, where the court considered this was a more appropriate way to deal with them and ensure they were afforded a fair hearing.¹⁸³ The less adversarial approach was also an acknowledgment that litigation is expensive, stressful and time-consuming, and that those aspects are exacerbated if the matter involves SRLs.¹⁸⁴

The Family Court's move to a less adversarial approach had implicit support from obiter dicta of the High Court¹⁸⁵ and explicit support from the Chief Justice of the Family Court.¹⁸⁶ The process involved the judge conducting and managing the proceedings from commencement until trial. The Less Adversarial Trial ('LAT') was justified primarily because of the special nature of family law disputes involving children where the ideal outcome is to determine the best interests of the child provided a different focus from other civil litigation.¹⁸⁷

The court's research revealed that the adversarial system exacerbated problems for SRLs attempting to comply with the rules and processes of the court.¹⁸⁸ In 2003, the Chief Justice and the Deputy Chief Justice of the FCA addressed the AIJA International Conference on Therapeutic Jurisprudence, stating that it was time to take a broader, more comprehensive approach to family law by considering the negative effect traditional combative adversarial

¹⁸³ Harrison, above n 39, 10–11; also see Jennifer McIntosh, 'The Less Adversarial Approach and Children's Best Interests' in FCA, *Less Adversarial Trial Handbook: A Companion to the Less Adversarial Trial* (Parenting Cases) DVD (2009), 1.

¹⁸⁴ Davies, above n 94, 50 comments that judges who are 'concerned about the best use by the public of the scarce resources of courts' are 'adopting some of the civil systems and using more inquisitorial methods' to manage and conduct trials.

¹⁸⁵ See, for example, the views of Wilson J as expressed in *Re JRL; ex parte CJL* (1986) 161 CLR 342, 362–363; and *M v M* (1988) 166 CLR 69, 76 (per the Court).

¹⁸⁶ Diana Bryant, 'The Future of the Family Court' (The Third Annual Austin Asche Oration, 23 November 2004, 11); see also comments of the Full Court of the Family Court of Australia in *In re P (a Child); Separate Representative* (1993) FLC 92–376.

¹⁸⁷ O'Ryan, above n 134, 32. O'Ryan J refers to s69ZN of the *Family Law (Shared Parental Responsibility) Act 2006* (Cth) which sets out the principles for conducting children's matters noting that the court 'must give effect to the listed principles in performing its duties and exercising its powers' and that although the nature of the litigation is 'child-focused', the number of principles under s69ZN will have wider application.

¹⁸⁸ Ibid, citing Family Court of Australia above n 134 and Hunter, above n 32, 171. Hunter supports the less adversarial approach as one which accommodates SRLs rather than expecting them to fit in with the court system.

proceedings may have on litigants in children's matters where both parties, as parents, need to continue to work together outside the court and beyond a judicial decision.¹⁸⁹ It was considered that allowing people to talk to the judge and being able to ask questions about process empowered people and gave procedural fairness.¹⁹⁰

The opening for the court to move away from the adversarial approach is contained in the comment in *Cachia v Hanes* where the High Court balanced the right of a litigant to appear in person with the 'burden' of the court to ensure 'that the necessary work of a litigant in person is done'. It identified that litigation involving an SRL 'is usually less efficiently conducted and tends to be prolonged'.¹⁹¹ The Family Court emphasised its obligation 'to the public that the court's limited resources are efficiently used'¹⁹² in better administering justice, and looked to ways of managing SRLs through 'firm case management at trial [which] is in the best interests of conserving scarce resources at all levels'.¹⁹³

Chief Justice Nicholson had commissioned a report in 2002 to explore whether the Family Court should adopt a more inquisitorial approach to proceedings in children's matters. Justice O'Ryan led a team which undertook a study tour to learn more about how courts in Europe manage children's cases.¹⁹⁴ The result

¹⁸⁹ Diana Bryant and John Faulks, 'The "Helping Court" comes full circle: The application and use of therapeutic jurisprudence in the Family Court of Australia' (Paper presented at the AIJA Third International Conference on Therapeutic Jurisprudence, 7–9 June 2006). Also see Allan, above n 6, 2 which says that the adversarial process, where each party takes a position and argues from it, is likely to encourage parties' oppositional and negative perceptions of each other, rather than a realistic assessment of the aspects of the dispute.

¹⁹⁰ Allan, above n 6. Allan cites research that finds that this perception was considered very important for fathers who may have lost involvement with their children and may feel better about the system if they are heard. See Edward Kruk, 'Discontinuity between Pre- and Post-Divorce Father–Child Relationships: New Evidence Regarding Paternal Disengagement' (1991) 16 *Journal of Divorce and Remarriage*, 195–227; Pauline Erera et al 'Fathering after divorce in Israel and the US,' (1999) 31 *Journal of Divorce and Remarriage* 55–82; Jane Gibson, 'Non-Custodial Fathers and Access Patterns' (Research Report 10, Family Court of Australia, 1992).

¹⁹¹ *Cachia v Hanes*, (1994) 179 CLR [415], per Mason CJ, Brennan, Deane, Dawson and McHugh JJ, [22]. The High Court noted that 'whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts', at 415.

¹⁹² *Seidler & Cerny (No 3)* [2015] FCCA 2119, per Pascoe J, [33].

¹⁹³ *Ibid* at 36.

¹⁹⁴ O'Ryan, above n 134.

was that the court piloted a less adversarial model in New South Wales as the Children's Cases Program ('CCP').¹⁹⁵ The CCP aimed at being child-focused by means of the judge speaking directly with the parents and not through their lawyers, to assist parents to identify the issues in dispute and to adduce evidence in relation to those issues 'within a procedure whereby the best interests of the children, rather than parental grievances, are the focus'.¹⁹⁶

While the Family Court favoured the less adversarial approach, not all agreed. In 2003, the House of Representatives Standing Committee report, 'Every Picture Tells a Story',¹⁹⁷ did not support the Court's less adversarial model, recommending instead that the Government establish a national Families Tribunal to adjudicate disputes about parenting matters. The Tribunal was to be 'child inclusive, non-adversarial, with simple procedures that respect the rules of natural justice'.¹⁹⁸ The Government did not accept the Committee's recommendation, choosing instead to create Family Relationships Centres while supporting the Court's introduction of a less adversarial process.¹⁹⁹

In the meantime, the CCP pilot had gone ahead. It was assessed in 2006 as successful²⁰⁰ and a second pilot, which extended beyond New South Wales to

¹⁹⁵ Stephen O'Ryan, 'A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases program' (Presentation at the 22nd Australian Institute of Judicial Administration Conference, September 2004).

¹⁹⁶ Ibid 8.

¹⁹⁷ House of Representatives Standing Committee on Family and Community Affairs, above n 170.

¹⁹⁸ Ibid, Recommendation 12, Note 23 [4], 157.

¹⁹⁹ House of Representatives Standing Committee on Family and Community Affairs Response to *Every Picture Tells a Story*, above n 174, [3.55]; The Government's reasoning behind the introduction of 65 Family Relationship Centres ('FRCs') was to highlight post-separation mediation as an early intervention alternative to litigation. Attending mediation prior to filing family law proceedings in children's matters (with some exceptions) became mandatory (*Family Law Act 1975* (Cth), s60I; Serena Nicholls, 'The New Family Dispute Resolution System: Reform under the *Family Law Amendment (Shared Parental Responsibility) Act* (Cth) 2006' (2007) vol 3 (1) *Bond University Student Law Review* 3.

²⁰⁰ Rosemary Hunter, 'Evaluation of the Children's Cases Pilot Program', (Report to the Family Court of Australia, June 2006). <www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/#eval>.

the Victorian registries of Melbourne and Dandenong, was assessed after four months, with participants reporting significant satisfaction with the process.²⁰¹

Evaluation of the two CCP pilots found that less adversarial processes were the most appropriate approach for the Family Court in all parenting cases. The CCP became known as the LAT and came into effect on 1 July 2006.²⁰² It represented a case management approach which has also been adopted in other courts. The distinguishing feature of the LAT is that it gave the judge the opportunity to move away from the traditional 'passive approach'²⁰³ and engage with litigants in a more direct interactive way. It also relaxed the rules of evidence. While it could be argued that this approach went against the principle of judicial impartiality, commentators considered that the active involvement of the judge provided many benefits for all participants in the trial process.²⁰⁴

The LAT has many features that distinguish it from a traditional trial process. The judge speaks to the parties directly rather than through their lawyers.²⁰⁵ Many of the traditionally accepted rules of evidence do not apply.²⁰⁶ The judge has the authority to narrow the issues to be decided and can decide what evidence is to be presented, by whom, and in what order.²⁰⁷ A family consultant is usually present throughout the hearing as an expert adviser to assist the court and the parties.²⁰⁸

It was considered that the LAT would be particularly helpful in cases where an SRL had to cross-examine their former partner. In such situations, the SRL addressed questions to the judge, who would then put them in an appropriate

²⁰¹ Jennifer McIntosh, *The Children's Cases Pilot Project: An Exploratory Study on Impacts on Parenting Capacity and Child Well-Being*, (Final Report to the Family Court of Australia March 2006), <http://www.familycourt.gov.au/presence/resources/file/eb000508dcbb97c/McIntosh_CCP_pilot_final.pdf.

²⁰² Sackville, above n 125.

²⁰³ *Rajski v Scitec Corp Pty Ltd* [1986] NSWCA 1, per Kirby, P. Samuels and Mohoney JJA, 16 June 1986), cited with approval in *Minogue v HREOC* (1999) 84 FCR 438, [28].

²⁰⁴ Harrison, above n 39; O'Ryan, above n 134; Faulks, above n 58.

²⁰⁵ Harrison, above n 39, 10–11.

²⁰⁶ Pat Fitzgerald and Michelle Fernando, 'Has the Less Adversarial Trial Process Abolished the Rules of Evidence?' (2009) 20 (3) *Australian Family Lawyer* 25, 26.

²⁰⁷ Harrison, above n 39, 10–11; *Family Law Act 1975* (Cth) s69ZX (1).

²⁰⁸ *Family Law Act 1975* (Cth) s69ZS.

manner to the witness. This ensured that the dignity and etiquette of the court were maintained and, in cases involving family violence, had the additional benefit of breaking the continuing cycle of abuse which arose when an SRL who was an alleged perpetrator directly cross-examined a victim.²⁰⁹ This aspect could also take the heat out of a dispute if alleged perpetrators understood that cross-examination would not afford an opportunity to harass their former partner and keep them in the witness box interminably, putting irrelevant and inappropriate questions to them.²¹⁰ The judge's management of the proceedings ensured that the questions were appropriate, and the process took less time,²¹¹ and the SRL might be encouraged to behave better and focus more on the evidence. The more direct involvement of the judge reduced the hostility of the proceedings. It might also encourage the parties to look at more realistic options for settlement.

Given that the majority of matters commence in the FCC and the LAT processes do not apply, the less adversarial framework may be aspirational. It does not work within the reality of a busy procedural hearing list on the first court date where the judge assesses the issues of a case and gives consideration to its direction within very short time-frames. In the event that the matter involves allegations of family violence or child abuse, it is difficult for an SRL to know or understand that these matters need to be brought to the judge's attention to assist in determining the nature of the parties' involvement with the

²⁰⁹ This procedure is enshrined in the *Criminal Procedure Act 1986* (NSW) which prohibits an unrepresented accused examining in chief or in cross-examination or re-examination, a complainant in sexual offence matters. Section 294A (2) provides arrangements that a complainant in proceedings involving sexual offences will not be cross-examined by the accused person in person.

²¹⁰ Abel, above n 34, 4.

²¹¹ Peter Johnson, 'Controlling Unreasonable Cross Examination' (2009) 21 *Judicial Officers' Bulletin* 29.

family consultant,²¹² whether an ICL should be appointed or other agencies notified about the potential for risk to the child or children.²¹³

The introduction of the less adversarial approach by the Family Court is not a challenge to the High Court's decision in *R v Watson*;²¹⁴ it is recognition that children's cases are not suitable for an entirely adversarial approach. The LAT is less adversarial, not non-adversarial or inquisitorial, and remains compliant with the adversarial framework of the Australian legal system. The Family Court was also following the High Court's guidance in *Secretary, Department of Health and Human Services v JWB and SMB*, that judges of the Family Court could develop guidelines 'to give further content to the phrase "best interests of the child" in responding to situations with which they will have to deal'.²¹⁵

To provide a context for why some LACs moved away from the service model of the traditional Scheme to one which offered extended services at different stages of an SRL's proceedings,²¹⁶ it is necessary to reflect on the impact of the 2006 Family Law reforms. One of the policy objectives of the reforms was to 'protect children from violence and abuse'.²¹⁷ Kaspiew et al. in an evaluation of the 2006 reforms to the FLA concluded that they 'had a positive impact in some areas and have a less positive impact in others', pointing out that the significant rates of family violence meant that many families would not be able to participate in mediation through the new Family Relationships Centres.

²¹² *Family Law Act 1975* (Cth) s60I (9) Exceptions to parties attending alternative dispute resolution in parenting matters.

²¹³ Matters remaining in state jurisdictions include family violence under state criminal laws and child protection, the principles of which in Tasmania, are governed under the *Children, Young Persons and Their Families Act 1997* (Tas).

²¹⁴ *R v Watson; ex parte Armstrong* (1996) CLR 248.

²¹⁵ *Secretary, Department of Health and Human Services v JWB and SMB* [1992] HCA 15; (1992) 175 CLR 218, 260 ('Marion's Case'). This is one of the primary cases under Australian law for deciding whether a child has the capacity to make decisions for themselves, and, when this is not possible, who may make decisions for them regarding major medical procedures.

²¹⁶ LANSW, Legal Aid WA, and Legal Services Commission of SA all operate extended duty lawyer services, see Introduction, A, fn 23 for details.

²¹⁷ Kaspiew et al 2009, above n 169, E4 referring to *Family Law Act 1975* (Cth), s 60J which sets out that family dispute resolution is not appropriate 'because of child abuse or family violence'; also see fn 198 for discussion on compulsory family dispute resolution in children's matters as a pre-filing procedure.

Acknowledging that people in family law disputes require a range of services beyond those introduced by the reforms, the evaluation recommended that legal assistance providers adopt a more integrated approach to offering services which provide assistance, advice, representation and referrals for families with complex parenting issues.²¹⁸

These reforms expanded the concept of 'access to justice' beyond access to the courts, with a more flexible meaning aimed at providing people with family law disputes access to 'a variety of preventative and early intervention strategies', including access to out of court dispute resolution services²¹⁹ and legal information and advice services. They also introduced the less adversarial approach which conformed to the philosophy that the family courts should be more 'friendly' in dealing with parenting matters.²²⁰ The LAT is used in FCA trials but has permeated the FCA and FCC to become part of a less formal, less confrontational approach in all proceedings. This is part of the courts' philosophy that it is a 'helping court', although it could be argued that it is recognition that self-representation is becoming the norm and SRLs need to be dealt with more compassionately than is possible under the adversarial system. It could also be an acceptance that, in the current economic climate, the ideal of full representation could not be met and the family law system needed to accommodate services which worked within the representational model to increase access to justice for SRLs.

The 2006 reforms represented, in particular for SRLs, a more accessible court system which could cater to the often complex nature of the issues or to the often multiple legal and non-legal problems people had.²²¹ The key strategies introduced by the reforms were designed to address and, if possible, alleviate

²¹⁸ Ibid. Also see Commonwealth Attorney-General's Department, *The New Family Law System*, above n 174, 367.

²¹⁹ Coumarelos et al 2012, above n 37, 229.

²²⁰ John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000) referred to simplified forms and procedures as making the Family Court more user-friendly; also see Rhoades, above n 6.

²²¹ Coumarelos et al 2012, above n 37.

family law disputes by creating a variety of services which dealt with the hardships disproportionately experienced by disadvantaged people,²²² at the earliest possible stage of their dispute.²²³ However, the FCA's embrace of the less adversarial model may also be seen as a way of more carefully controlling the impact of SRLs on the court system with regard to saving time and costs and does not mean that the court has dismissed the adversarial approach. Notably, the LAT does not include financial proceedings and the overwhelming number of both children's and property matters now commence in the FMC. While the less adversarial model may be used as a guiding principle, it does not apply in every case or in every court.

(vi) How does the duty lawyer operate in the less adversarial system?

The duty lawyer can work within the less adversarial process to help SRLs better understand their rights and options and the way the court operates, to explore the chances of settlement while stressing the importance of other ways of resolving family law disputes. This is particularly so when there are allegations of abuse or family violence and the parties are exempt from the duty to attend mediation. The duty lawyer's intervention provides the SRL with advice and representation and assists the court so that the judge does not need to provide procedural advice, which also protects judicial impartiality. The Scheme does not hold itself out as providing full representation. It fills the gap between no representation at all and full representation by providing a range of services to the great number of people who are either ineligible for legal aid or cannot afford legal services. In using the 'triage' medical analogy, after dealing with the SRL, the duty lawyer passes the SRL on to another service²²⁴ or better

²²² Pascoe Pleasence, Christine Coumarelos, Suzie Forell, Hugh M McDonald and Geoff Mulherin (Pleasence et al) 'Reshaping Legal Assistance Services: Building on the Evidence Base' (Discussion Paper, Law and Justice Foundation of NSW, Sydney, 2014) 17. <[http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/\\$file/](http://www.lawfoundation.net.au/ljf/site/articleIDs/D76E53BB842CB7B1CA257D7B000D5173/$file/)>; also Suzie Forell, 'Is Early Intervention Timely?' (2015) *Justice Issues*, Paper 20, (Law and Justice Foundation of NSW), 1–13.

²²³ Forell, *ibid*.

²²⁴ *Protocol*, above n 8. The Protocol outlines that the duty lawyer needs to make a preliminary assessment of a person's eligibility for legal aid, and, if appropriate, refer to an in-house or private practitioner to pursue an application for legal aid.

equips the SRL to deal with their own matter through the court.²²⁵ It has been said that the duty lawyer service 'is a statement of accountability and commitment toward improvement of service for litigants and the system of justice in family law'.²²⁶

The notion of the adversarial system rests on both parties being represented. Clearly, the duty lawyer does not attempt to emulate the model of full representation. It is important to understand, however, how the duty lawyer fits into a different system where the judge allows more flexibility and less formality.

The researcher contends that the duty lawyer service works comfortably within the framework of the less adversarial model as a legitimate and valuable service, and may not represent the 'ideal' of full representation but nevertheless improves and expands access to justice and the quality of justice for SRLs.

The less adversarial model allows judges to use their discretion how best to conduct the court and ensure a balance of rights and opportunities for SRLs to put their case to the judge in their own words. The judge determines the circumstances where the court could assist an SRL, depending upon each situation. This approach allows judges to discharge their duty to ensure a fair hearing while the rules of law and procedure are maintained.²²⁷ In a system where the judge is more involved and controls proceedings, it is possible for the judge to address SRLs and ask if they need the assistance of the duty lawyer. The judge can then stand the matter down until the duty lawyer has had the opportunity to take instructions and bring the matter back to court in a way that advances the proceedings.

²²⁵ Gordon MacDonald and Helena Birt, 'Duty Counsel and the Self-Represented Litigant' (2001) 19.3 *Canadian Family Law Quarterly* 2. It is interesting to note that one of the judges used medical terminology in describing the work of the duty lawyer, comparing them to medical registrars (also see Interview: Judge 2, Chapter IV: B Part I: 2).

²²⁶ MacDonald and Birt, *ibid* 2.

²²⁷ Senate Legal and Constitutional Affairs Committee, *Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice*, (6 March 2009), citing Human Rights Law Resource Centre, 'The Right to a Fair Hearing and Access to Justice: Australia's Obligations: Submission'.

It is contended that even though the less adversarial process is designed for trials, its philosophy places greater emphasis on collaboration with all participants in the legal profession, both during and outside formal trial proceedings. The judge can ask the duty lawyer to assist in hearings where an SRL may either intentionally or unintentionally derail the process by making irrelevant and possibly inappropriate submissions that delay the process and increase costs for the other party.²²⁸ The judge can call on the duty lawyer to give the SRL advice on the court's processes and procedures and bring the matter back on track. In matters involving child abuse or family violence, the judge can rely on the duty lawyer bringing these issues to the judge's attention at an early stage. The duty lawyer may also be instrumental in assisting in negotiations with the other party's lawyer, thereby acting as a barrier between an alleged victim and their alleged abuser.

The impact of introducing less adversarial processes, ironically, may be seen as encouraging more people to represent themselves. Arguably, the process offers access to strategies which better meet the needs of the SRL as well as providing an environment for the courts and the legal profession to work collaboratively to achieve better outcomes.²²⁹ It may also be seen as a vehicle by which judges can offer SRLs the assistance of a duty lawyer and thereby maintain judicial impartiality while ensuring SRLs receive equitable treatment.

²²⁸ Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants—The Dark Side' (2014), Access to Justice, Paper 32. <<http://www.civiljustice.info/access/32>> citing the Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia – Final Report Project 92* (Law Reform Commission of Western Australia, 1999), 153 that a proportion of SRLs appear 'to be resistant to or unable to engage in litigation in a respectful, fair or timely manner and which require more time, more energy and greater focus of attention by those working within courts and tribunals'; and a general perception is that regardless of their motivation, SRLs increase costs for all parties due to their inability to understand the system and the court takes 'greater time responding to unclear and irrelevant evidence and more time spent in hearings', 8.

²²⁹ Richard Colin Chisholm, "Less Adversarial" Proceedings in Children's Cases' (2007) 77 *Family Matters*, Australian Institute of Family Studies.

F The evolution of the Family Law Duty Lawyer Scheme

Many reports, including those of the Family Court discussed in section I.E above, recommended the introduction of, or an extension of, duty lawyer services to all family courts, and eventually this was achieved. This section explores the benefits of duty lawyer schemes and traces the origins of the national Scheme. It then compares similar Family Court duty lawyer services: duty lawyers in the criminal jurisdiction and internationally in family courts, operating prior to the Family Law Duty Lawyer Scheme, to illustrate the differences between schemes.

As early as 1998, a study by the Socio-Legal Research Centre of Griffith University noted that at the time when a duty lawyer service was available only in Victoria, 'the duty lawyer scheme had been used by 68.6 per cent of Victorian litigants'.²³⁰ This was an encouraging finding in the context of SRLs wanting to use the service. The Family Law Council, in an extensive report to the Attorney-General in August 2000, made a number of recommendations, one of which was that there be a 'co-ordinated family law duty lawyer or similar service' provided to assist SRLs in family matters.²³¹ In its 2000 discussion paper, the ALRC noted the important role the duty lawyer could play and the difficulty for the court to maintain impartiality while ensuring that an SRL receives a fair trial. It drew on past reports to recommend 'possible types of schemes, including duty advice schemes' which would prove more effective were advice provided to SRLs 'before [their] day of court'.²³² The comment acknowledges the benefits of the duty lawyer service being available to SRLs before and beyond their court event, an issue explored in this study.

²³⁰ Dewar, Giddings and Parker, above n 14.

²³¹ Family Law Council, Litigants, above n 1, 47 Recommendation 8(c).

²³² Australian Law Reform Commission, *Managing Justice—A Review of the Federal Civil Justice System*, Discussion Paper No 62, (1999) ('*Managing Justice*').

(i) Pilot program: Parramatta, August 2002–June 2003

In a comprehensive paper in 2002,²³³ Sackville dealt with access to justice issues confronting the civil and criminal justice system. The paper presented a ‘roundtable discussion’ where a number of positive options were advocated for increasing access to justice for disadvantaged Australians. In the conclusion to the section on family law matters, Sackville noted that he was ‘particularly proud ... of a pilot duty scheme recently introduced [by LANSW] at the Family Court and Federal Magistrates Court at Parramatta’.²³⁴ Prior to the introduction of this pilot program, LANSW and VicLA were providing some registries of the family courts with duty lawyer services, while other registries were served by private practitioners on a voluntary basis.²³⁵

Legal Aid NSW conducted a pilot program in the Parramatta registries of both the FCA and the (then) FMC from August 2002 to June 2003. It involved one duty lawyer located at the Parramatta family courts on each duty list day for half a day, to assist SRLs. The position was filled on rotation by practitioners working in the LANSW family law section, who provided advice, assistance and limited representation on the day for SRLs. If SRLs were eligible for legal aid, the duty lawyer referred them to the in-house practice. The main difference from the previous commitment by LANSW was that during the Pilot, the duty lawyer was dedicated to the role and located at the court, rather than located at LANSW and being ‘on call’ for referrals from the court. LANSW duty lawyers assisted SRLs draft simple documentation, provided representation in court, participated in negotiations by exploring settlement options and diverted matters from the court by referring SRLs to other more appropriate services if the duty lawyer assessed it as a non-legal matter. The Senate Constitutional References

²³³ Sackville, above n 125.

²³⁴ Ibid 58.

²³⁵ In 2003, the FCA and FMC shared duty lawyers in Melbourne, Dandenong and Parramatta, and Newcastle. The FCA had duty lawyers available in Sydney and Adelaide. In other family courts, the court may refer an SRL to a private practitioner who will appear pro bono, *Federal Court Rules 2011* (Cth), rr 4.11–4.18; Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 2003, Duty Solicitors, Question 2571.

Committee recommended the Parramatta scheme as a model for a national service, noting LANSW's submission that:

[t]he Scheme is quickly becoming a necessity, as demonstrated by the large numbers of matters that are being resolved on a final basis through the service. For many of those assisted, it also avoids all the associated personal cost and stress associated with ongoing litigation and saves the court both time and cost.²³⁶

It was clear that there needed to be more than one way of responding to the challenges posed by SRLs. On the one hand, the legislative and court reforms and the initiatives taken by the courts in streamlining and simplifying their procedures and developing judicial guidelines assisted SRLs; on the other hand, it was considered that, in themselves, these measures did not solve all the problems caused and suffered by SRLs, were not ameliorating their impact on the court, and were not reducing SRL numbers.²³⁷ To help SRLs, it was necessary to look to other support services as well. The FMC had previously mentioned the important contribution it considered extant duty lawyer schemes made to providing SRLs with legal services.²³⁸ In the 2004–2005 Annual Report, the FMC referred to the recent response by the Commonwealth Government to the Senate Constitutional and References Committee's report and indicated support for the new initiative of a new national duty lawyer scheme.²³⁹

The judiciary had also commented that the intervention of a duty lawyer assisted the court by taking away any concern a judge might have about how

²³⁶ Senate Legal and Constitutional References Committee, above n 137 [10.75] citing LANSW, Submission 91, 30–31.

²³⁷ Sourdin and Wallace, above n 228, 14 note that the extent to which these initiatives have assisted SRLs or courts in dealing with SRLs is not known, citing Victorian Law Reform Commission, *Civil Justice Review: Report* (Victorian Law Reform Commission, Melbourne, 2008), 564, regarding a discussion of the impact on pro-bono schemes.

²³⁸ FMCA, above n 155, 40. The court's research project titled 'A Day in the Life of a Self-Represented Litigant' was conducted during 2003–04.

²³⁹ Ibid.

far he or she could help an SRL without compromising impartiality.²⁴⁰ The positive responses to the existing, albeit limited, schemes suggested that assistance provided to SRLs by a duty lawyer met SRLs' needs for legal advice and assistance, relieved pressure on the judiciary, and reduced delays in the court generally improving the efficiency and effectiveness of the court's process.

(ii) Proposals for a national Family Law Duty Lawyer Scheme

The LANSW pilot in Parramatta was assessed a success²⁴¹ and, following extensive consultations between the Commonwealth Attorney-General's Department and National Legal Aid and the courts, a draft protocol was developed in 2004 which set out the policies and principles under which the Family Law Duty Lawyer Scheme would operate nationally.²⁴²

Also in 2004, the Senate Legal and Constitutional References Committee released its final report on legal aid and access to justice.²⁴³ This was a follow-up to its report in 1998, and re-examined the state of legal aid and 'some serious issues in relation to legal aid and access to justice more generally'.²⁴⁴ One of its recommendations to minimise 'the adverse effects of self-represented litigants' was that the Government support the expansion of the criminal duty lawyer scheme for family law matters.²⁴⁵ The Committee noted that the Commonwealth Government's Budget 2004–2005 Statement provided 'increased funding for legal aid which will include a component to provide a new duty lawyer service for self-representing litigants in family law matters before

²⁴⁰ Robert Nicholson, 'Australian Experience with Self-Represented Litigants' (2003) 77(12) *Australian Law Journal* 820, 826.

²⁴¹ There is no reference available to see how the success of the program was determined. The Commonwealth Attorney-General's Department provided the researcher with an internal paper which briefly outlined the arrangements for the Scheme, and that 'Following the successful pilot from August 2002 to June 2003 in both the Family Court and Federal Magistrates Court (in Parramatta), the Commonwealth Government allocated funding for the Scheme to provide a new duty lawyer service to assist self-represented litigants in family law matters before the Family Court, the Family Court of Western Australia and the Federal Magistrates Court'.

²⁴² *Protocol*, above n 8.

²⁴³ Senate Legal and Constitutional References Committee, above n 137, see Ch 10, 18–204.

²⁴⁴ *Ibid* xv.

²⁴⁵ *Ibid*.

the Family Court and the Federal Magistrates Court' to operate through state and territory LACs.²⁴⁶

The Committee took note of the FMC's description of the duty lawyer scheme as 'an essential adjunct to efficient operation of the Court'²⁴⁷ and specifically cited the Director of the Legal Services Commission of South Australia:

There is an urgent need for the establishment of a duty lawyer advice scheme to operate in every family court registry and all magistrates' courts. The number of unrepresented litigants in both the magistrates' court and the Family Court is resulting in highly inefficient and potentially inequitable court proceedings, with court delays for everyone being inevitable.²⁴⁸

It noted that other submissions argued for increased funding to enable duty lawyers to be present at first mention dates in all family law cases²⁴⁹ while acknowledging that others were concerned that 'reliance on the duty solicitor scheme to fill the gaps in legal aid funding was not a satisfactory solution'.²⁵⁰ It expressed concern that any duty lawyer scheme 'which merely performs a role as a mouthpiece, with solicitors consulted only minutes before the matter is heard, will not adequately address the problems raised by lack of legal representation'.²⁵¹ It should be noted that these comments referred to duty lawyer schemes in the criminal jurisdiction.²⁵²

The Committee recommended that:

²⁴⁶ Ibid 68.

²⁴⁷ Ibid [10.74] citing Federal Magistrates Court of Australia, *Annual Report 2001–2002*, 12.

²⁴⁸ Ibid [10.74] citing Mr Hamish Gilmore, Legal Services Commission of South Australia, *Committee Hansard*, 11 November 2003, 11.

²⁴⁹ Ibid [10.78] citing The Law Society of South Australia, Submission 92, 2; Legal Services Commission of South Australia, Submission 51, 6 and 26; Law Council of Australia, Submission 62, 2; Riverland Community Legal Centre, Submission 11, 4–5.

²⁵⁰ Ibid [10.79] citing Victoria Legal Aid, Submission 87, 8; Federation of Community Legal Centres (Vic) Inc. Submission 50, 28.

²⁵¹ Ibid [10.81].

²⁵² Ibid [10.79], citing Fitzroy Legal Service, Submission 48, 18; Federation of Community Legal Centres (Vic) Inc., Submission 50, 28. These submissions pointed out that sometimes duty lawyers only give five minutes to assist with guilty pleas, which placed pressure on SRLs to plead guilty.

the Commonwealth Government ... provide funding to establish a comprehensive duty solicitor scheme in all states and territories of Australia. The scheme should offer, at the very least, a duty solicitor capacity of first instance [criminal, civil and family] and should provide legal advice and representation and assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute.²⁵³

National Legal Aid joined the debate in 2004 by recommending that there be 'further development of duty lawyer schemes' in its submission to a Federal Civil Justice Strategy Paper developed by the Attorney-General's Department.²⁵⁴

In its response to the Committee's report, which contained endorsements by other bodies,²⁵⁵ the Government supported the recommendation that there be further development of duty lawyer schemes in all family courts.²⁵⁶

G Introduction of the Family Law Duty Lawyer Scheme – March 2005

The Scheme was implemented from 29 March 2005 by the (then) Labor Government following extensive consultations with key participants in the family law system²⁵⁷ as part of the Government's response²⁵⁸ to the numerous reports

²⁵³ Ibid Recommendation 57 [10.83]: 'Government senators note that Commonwealth funding was provided in the 2004–05 budget for duty lawyer services' and encourage state and territory governments to provide funding support for duty lawyer schemes.

²⁵⁴ National Legal Aid, Submission to the Civil Jurisdiction and Federal Courts Branch, Attorney-General's Branch, Federal Civil Justice Strategy Paper (June 2004), Recommendation [14.9].

²⁵⁵ Australian Law Reform Commission, *Managing Justice*, above n 30.

²⁵⁶ Australian Government, 'Response to the Report of the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child-Custody Arrangements in the Event of Family Separation' (June 2005).

²⁵⁷ Law Council of Australia, *Erosion*, above n 2; Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants' (Research Report No 19, Family Court of Australia, 1999); Hunter, above n 32; Dewar, Smith and Banks, above n 1; Dye, above n 158; Australian Institute of Judicial Administration and the Federal Court of Australia, 'Australian Institute of Judicial Administration and the Federal Court of Australia, Forum on Self-Represented Litigants' (Paper presented at the Forum on Self-Represented Litigants, Sydney, September 2004).

²⁵⁸ Australian Government, *Response to Every Picture Tells a Story: Response to the report of the House of Representatives Standing Committee on Family and Community Affairs Inquiry into Child Custody Arrangements in the Event of Family Separation* (June 2005).

calling for an early intervention strategy to deal with the growing number of SRLs appearing in the family courts.²⁵⁹ Unlike the requirement for grants of legal aid,²⁶⁰ assistance of the duty lawyer was free and neither means nor merit tested. In the 2004–05 Budget, the Commonwealth Government provided funding of \$3.3m per annum indexed over four years to State and Territory LACs for the establishment of the Scheme, whereby a duty lawyer was introduced into every registry of the FCA, the Family Court of Western Australia ('FCWA) and the FMC.²⁶¹

A key feature of the Scheme was that services were provided at the duty lawyer's discretion and no proof of income was required.²⁶² The service was only offered to SRLs on the day their matter was in court and, in theory, limited to assistance on one occasion only; it was not intended to provide unlimited free representation for SRLs. It was assumed that it would work very much as the criminal duty lawyer model, with the duty lawyer dealing summarily with matters

²⁵⁹ Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Department of the Attorney-General, 2001), 1–115; Commonwealth Attorney-General's Department, 'A New Approach to the Family Law System: Implementation of Reforms,' (Discussion Paper November 2004); Australian National Audit Office, 'Client Services in the Family Court and the Federal Magistrates Court,' (Report No 46, May 2004); Family Court of Australia, 'Client Satisfaction and Survey Report,' (Survey Report, September 2004); Joint Committee on Public Accounts and Audit, Parliament of Australia, 'Review of the Auditor General's Reports' 2003–04; Third and Fourth Quarters; First and Second Quarters of 2004–05, Report 404 (2005); Family Court of Australia, 'Feedback from Focus and Discussion Groups: Consultation with Family Court Clients and Legal Practitioners' (August 2005).

²⁶⁰ Legal Aid Commission of Tasmania 'Guidelines for Grants'. See LACT's Means Test at Guideline 2 and Guideline 7(1) (c) 'Subject to any discretion vested in the Director, where an applicant satisfies the Means Test, an initial contribution will be payable at a minimum level of \$60 and Guideline 3(1) outlines the Commonwealth Merits Test to be satisfied (c) (i) the reasonable prospects of success test; and the prudent self-funding litigant test; and the appropriateness of spending limited public legal aid funds test. <<https://www.legalaid.tas.gov.au/wp-content/uploads/2015/06/LACT-Guidelines-for-Grants-of-Aid.pdf>>.

²⁶¹ Australian Government, 'Budget Paper No 2, Budget Measures 2004–05,' Commonwealth of Australia, 2004. The Government committed to 'increase funding for Commonwealth legal aid by approximately 10% ... [to include the] establishment of a family law duty lawyer service'. <<http://www.budget.gov.au/2004-05/bp2/html/expense-02.htm>>.

²⁶² Legal Aid Commission of Tasmania, above n 260. See LACT's Means Test at Guideline 2 and Guideline 7(1) (c) 'Subject to any discretion vested in the Director, where an applicant satisfies the Means Test, an initial contribution will be payable at a minimum level of \$60; Guideline 3(1) outlines the Commonwealth Merits Test, (c) (i) the reasonable prospects of success test, the prudent self-funding litigant test, and the appropriateness of spending limited public legal aid funds test. <<https://www.legalaid.tas.gov.au/wp-content/uploads/2015/06/LACT-Guidelines-for-Grants-of-Aid.pdf>>.

in court. However, considering criticism of the criminal duty lawyer scheme²⁶³ the Government, in consultation with stakeholders, developed draft guidelines for the family duty lawyer which did not limit his or her attendance on an SRL by time but left this to the duty lawyer's discretion, to be exercised according to the circumstances of the case.²⁶⁴

The pilot study revealed that the intervention of the duty lawyer would generally reduce the level of frustration experienced by SRLs by helping them to work out what they needed to know and do. It was also intended to relieve the pressure imposed by SRLs on other participants in the family court system. The assumptions behind the Scheme were that it would provide access to justice 'particularly to those who are already disadvantaged'.²⁶⁵ It was an early

²⁶³ Senate Legal and Constitutional References Committee, above n 137, 181–204, citing Fitzroy Legal Service, Submission 48, 18; Federation of Community Legal Centres (Vic) Inc., Submission 50, 28, footnote 175. Criticism had been made that criminal duty lawyers gave limited time to clients due to the pressure on the criminal justice system in Magistrates courts, see Law Institute Victoria, President's Blog, Blog Post 'Changes to VLA guidelines—access to justice denied,' September 27, 2012. The President commented on changes to VicLA's guidelines which denied aid to people in traffic offences, resulting in those people needing the assistance of a duty lawyer. The President noted that, generally, a person had only '10 minutes to talk to the duty lawyer' and said that 'where a person's liberty is at stake, it is reprehensible that they should be hurried through the system purely as a so-called cost-saving measure'. The President pointed out that 'expected to work in this way, duty lawyers themselves may be breaching their professional obligations under the professional Conduct and Practice Rules 2005 by not attending to the work with competence, diligence and by taking on a matter with insufficient time to do it justice'. Representatives of VicLA pointed out that 'Whilst demand for our help is high, we do not impose a time limit on our duty lawyer service. Some people only need 10 minutes with a duty lawyer – some people need longer'; also see William R Beattie, 'The Duty Solicitor Scheme—Help or Hindrance' (1975) 4 (4) *Queensland Lawyer* 75; Queensland Crime and Justice Commission, *Funding Justice: Legal Aid and Public Prosecutions In Queensland* (2001). Beattie's study of duty solicitors in the Queensland Magistrates Court found that duty solicitors spent an average of 10 minutes interviewing clients and fifty seven seconds on a guilty plea and 1 minute 45 seconds (no bail submission) to approximately 30 seconds when bail was opposed, at 78.

²⁶⁴ *Protocol*, above n 8 [2.3]. The Protocol provides guidance for the duty lawyer under [3.1] Prioritisation, including considerations of family violence and whether there are other special circumstances which impact upon the person's capacity to represent themselves, such as a disability, literacy, language barrier, cultural issues or the geographical location. Compare, VicLA, 'Criminal Law Duty Lawyer Guidelines' which identify 'priority clients who may receive assistance from the duty lawyer as people with an intellectual disability, an acquired brain injury or other mental health issue, homeless people, people who cannot effectively communicate in English or who identify as Indigenous Australians, see [8.2]. It is left to the duty lawyer to assess whether a client falls into a priority group, see [8.3].

²⁶⁵ Senate Legal and Constitutional References Committee, above n 135, xv; also see George Zdenkowski, 'The Impact of *R v Dietrich* on Legal Aid Policy' <<http://www.nla.aust.net.au>>. Zdenkowski said, 'Legal aid (like health and education) is a national public policy issue' for

intervention measure designed to divert people from the courts and assist them in resolving their own disputes,²⁶⁶ and aimed to:

- minimise the adverse impact of SRLs on the operations of the courts;²⁶⁷
- assist SRLs prepare simple documentation, provide advice to narrow the issues in dispute, participate in negotiations towards settlement and act as a referral service; and
- avoid all the associated personal cost and stress associated with ongoing litigation and save the court both time and cost.²⁶⁸

The role of the duty lawyer may have initially been seen as limited, although helpful, in that the duty lawyer provided services for people on their day in court who were either not eligible for or had been denied legal aid.²⁶⁹ Over time, the Scheme developed beyond being a 'stop gap measure',²⁷⁰ it provided a valuable service to SRLs which was immediate, realistic, effective and cost-effective, providing both benefits to the Commissions and the courts.²⁷¹ It was delivered by duty lawyers conscious of both the needs of SRLs and the requirements of the court. As part of the Government's new approach to the family law system,²⁷² it was an adjunct which greatly improved both access to

'equitable and adequate funding are preconditions for access to justice for disadvantaged Australians' 2.

²⁶⁶ Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce, Attorney-General's Department, Commonwealth of Australia, (2009), 3.

²⁶⁷ Senate Legal and Constitutional References Committee, above n 137, 115.

²⁶⁸ Ibid 30–31, cites LANSW Submission 91.

²⁶⁹ Ibid 203, citing Fitzroy Legal Service Submission 48, 13.

²⁷⁰ Ibid 204, citing Fitzroy Legal Service Submission 48, 18.

²⁷¹ PwC, *Economic Value*, above n 37.

²⁷² House of Representatives Standing Committee on Family and Community Affairs, above n 170. The Scheme was introduced as one of the early intervention and prevention services together with a raft of new measures such as a new network of 65 Family Relationships Centres, additional children's contact services, education and counselling services and specialised family violence services. There were also changes to the *Family Law Act 1975* (Cth) which recognised the importance of children having a meaningful relationship with both parents and a new presumption of joint parental responsibility, except in cases involving child abuse or family violence; the requirement for parents to attend alternative dispute resolution before filing an application in the courts; requiring the courts to consider substantial sharing of parenting time in appropriate cases, and better recognising the interests of the child in spending time with grandparents and other extended family. These changes were

and the delivery of justice. The service provided did not replace full representation, but it did improve and expand access to information, advice and representation for SRLs who would otherwise receive no assistance at all.

In a 2009 report by a taskforce established by the Attorney-General's Department, the Scheme was reviewed under a broad definition of access to justice arrangements as part of an 'informal justice strategy'. The report highlighted the benefits of the Scheme in providing people with information 'that empowers [them] to resolve disputes [and] provide pathways [which enhance] people's capacity to understand their position ... providing a range of mechanisms to resolve disputes [which] increases access to justice'.²⁷³ Its findings about the demand for, and cost of, duty lawyer services indicated that they were a low-cost and effective early intervention strategy that represented 'excellent value for money and [prevented] the escalation of disputes'.²⁷⁴ However, it noted that the service was not being optimised and that, in 2007-08, 'only 10.9 per cent' of legal aid expenditure was on 'early intervention' services.²⁷⁵

The report commented that although the Scheme had only been in existence since 2005, 'feedback from the courts in which duty lawyers were made available indicated that the duty lawyer service has been effective in directing parties to alternative dispute resolution ('ADR'), facilitating early settlement of

recognised in legislation in the 2006 reforms which introduced amendments to Part VII of the FLA, 2–10.

²⁷³ Attorney-General's Department, *Framework*, above n 266, 3–4. The report took a holistic approach to considering 'What is access to justice?' and cited Marc Galanter, 'Justice in Many Rooms' in M Capelletti (ed.) *Access to Justice and the Welfare State* (Sijthoff, 1981, 161–2: 'Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged'; also see Zdenkowski, above n 265. Zdenkowski said that 'in the area of legal aid, identification of the service presents its own problems because of the difficulty of applying performance indicators to a service some of whose elements are necessarily intangible ... justice is not easy to quantify', 1

²⁷⁴ Attorney-General's Department, *Framework*, above n 266, 55–56.

²⁷⁵ Ibid 143, see Figure 11.1: Legal Aid Expenditure and Service Levels, 2007–2008.

matters and reducing the level of frustration experienced by SRLs'.²⁷⁶ It endorsed the Scheme and initiated research which supported the extension of duty lawyer services beyond the day an SRL's matter was in court.²⁷⁷ The research did not discuss and therefore did not consider whether the National Protocol, produced as a draft in 2004 and published in final form in 2007 (and which remains current), supports the framework of an extended service.

(i) Family Law Duty Lawyer National Protocol

The Scheme is governed by the Family Law Duty Lawyer Scheme National Protocol (the 'Protocol').²⁷⁸ The Protocol was developed by the Commonwealth Attorney-General's Department in consultation with National Legal Aid, the FCA, the FCWA and the (then) FMC, now the FCC. It sets out the guidelines for the provision of duty lawyer services in the Family Courts.

The aims and objectives of the Protocol are to:

- provide assistance to people who are unrepresented by a lawyer (unrepresented party) in family matters before the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court;
- enhance the Legal Aid Commissions' commitment to service delivery by providing an effective, efficient and economic delivery of high quality duty lawyer services to unrepresented parties involved in family matters; and

²⁷⁶ Ibid 145.

²⁷⁷ Australian Law Reform Commission, *Managing Justice*, above n 30, 36; Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, ('Productivity Commission'); Allen Consulting Group, 'Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions' (Final Report, Prepared for the Australian Government Attorney-General's Department, 2014) ('Allen Consulting'); PwC, *Economic Value*, above n 37, 15; Attorney-General's Department, *Framework*, above n 266, 19.

²⁷⁸ *Protocol*, above n 8.

- assist the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court to enhance the delivery of justice to unrepresented parties.

The guidelines indicate the type of services the duty lawyer can provide: that assistance ‘will normally be provided on one occasion only during the course of proceedings’ and that the decision of the duty lawyer in relation to determining whether to provide assistance and the level of that assistance will be final.²⁷⁹

The literature suggests that general principles underpinning the Scheme as an early intervention measure would have ‘more effect if advice were provided to SRLs before [their] day of court’.²⁸⁰ However, there is little consensus as to what ‘early intervention’ means in the context of a legal dispute. There have been different interpretations adopted, including early enough to prevent problems developing,²⁸¹ early in the time of a problem,²⁸² early in the development of the problem,²⁸³ or at the earliest time a person receives assistance with the problem regardless of its stage of development.²⁸⁴ Forell contends that ‘if early intervention services are not appropriate to those with the most need, they become an adjunct to rather than a replacement of crisis response services, further stretching already limited resources’.²⁸⁵ She suggests that services which take account of the ‘nature of the experience of the client’ and how and when assistance is sought are better at providing effective services which are ‘targeted’ and ‘tailored’ to a person’s particular

²⁷⁹ Ibid [2.1] Duty Lawyer Services; [2.2] Nature of assistance provided; [2.3] subject to the discretion and availability of the duty lawyer; [3.1] Prioritisation; [3.2] number of times assistance will be provided; and [3.3] the finality of the duty lawyer’s decision.

²⁸⁰ Australian Law Reform Commission, *Managing Justice*, above n 30, 359–360; Coumarelos et al 2012, above n 37; Council of Australian Governments 2010, *National Partnership Agreement on Legal Assistance Services* (COAG), Canberra.

²⁸¹ National Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group 2013, *Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector: Final Report*, Action Committee on Access to Justice in Civil and Family Matters.

²⁸² Forell, above n 222.

²⁸³ Ibid.

²⁸⁴ Suzie Forell and Michael Cain, ‘An Evaluation of Legal Aid NSW’s Family Law Early Intervention Unit Duty Lawyer Service’, Law and Justice Foundation of New South Wales, November 2012.

²⁸⁵ Forell, above n 222.

needs, so the timing when legal assistance provided is not ‘unidimensional’ and the services which should cater to a person’s needs should offer more ‘holistic, targeted, client-centred responses’.²⁸⁶

The Protocol guidelines indicate that duty lawyer services should be provided to an SRL ‘in relation to an imminent court event’.²⁸⁷ There is no precise meaning of ‘imminent’, and the duty lawyer has the discretion to provide assistance outside the confines of an SRL’s court event and in relation to the circumstances of a matter.²⁸⁸ The timing of the duty lawyer’s intervention is interpreted differently by the various LACs which have carriage of the Scheme,²⁸⁹ and also by the commentators who have addressed the issue.²⁹⁰

It is not possible to assess or evaluate the multiple aims of the Protocol as there are no national performance standards which individual duty lawyers can use as a benchmark. The Protocol clearly proceeds on the assumption that there are benefits in providing the duty lawyer service. The researcher contends that the Protocol represents the minimum standard of service delivery but is flexible enough to allow an expansion of the service to better meet the needs of all

²⁸⁶ Ibid.

²⁸⁷ *Protocol*, above n 8 [2.1].

²⁸⁸ Ibid [2.3].

²⁸⁹ Duty lawyers provided by LACs usually attend court on duty lists and other sitting days for some or part of the day. See Legal Aid ACT (duty lawyer attends the family courts for ‘part of each sitting day’); Legal Aid Commission of Tasmania, ‘the duty lawyer is available for advice and may provide limited representation on all duty list days. The duty lawyer is available for advice and limited assistance with preparing documents on Mondays between 1pm and 2pm at the court’; Legal Aid Queensland provide a ‘family law duty lawyer in the Brisbane, Cairns and Townsville family courts for ‘people who turn up to court for a session that day without having received any information or advice from a lawyer; Legal Services Commission of South Australia provides duty lawyers at the Family Law Courts ‘to provide advice and assistance to self-represented litigants who are currently involved in court proceedings or about to start court proceedings’; Northern Territory Legal Aid Commission provides a duty lawyer ‘at the Court on the day of your Court matter’ or if not in Darwin, ‘call the duty lawyer ... on the date your matter is in Court’; Legal Aid Western Australia has two duty lawyers a coordinator and a paralegal based at the Family Court of WA. This arrangement is similar to the LANSW EIU and provides extended duty lawyer, services; VicLA provides duty lawyer services in the metropolitan area and contracts duty lawyer services to private practitioners in regional centres. VicLA’s website says the ‘Duty Lawyer Service may not be available every day’. In a recent review of its family law services, VLA indicated it would be piloting a duty lawyer service similar to the LANSW EIU.

²⁹⁰ See Chapter I: G Introduction of the Family Law Duty Lawyer Scheme; also see Attorney-General’s Department, *Framework*, above n 266 and Forell, above n 222.

participants in the family law system within the boundaries of allocated resources.

The Protocol allowed for a review of the Scheme by any participant after three years.²⁹¹ An internal review was conducted by the Commonwealth Attorney-General's Department between January and July 2007, following the piloting of the Scheme in Parramatta. It concluded that the duty lawyer service was 'an extremely valuable and effective service and the courts in particular were in favour of the service becoming permanent'.²⁹² The funding of the Scheme was reclassified and became part of the overall Commonwealth funding allocation to each Legal Aid Commission. This ensured the continuation of the Scheme.

(ii) Analysis of the Protocol

Although the Protocol sets out the aims and objectives of the Scheme, there is no provision for how the objectives are to be measured or outcomes recorded against them. LACs maintain statistics on the number of attendances and the nature of the advice duty lawyers provide to SRLs, but there has not been an evaluation of the Scheme or a review of the Protocol to indicate that the Scheme is successful in achieving its stated objectives. In its 2014 submission to the Productivity Commission, NLA referred to literature that found duty lawyer services are 'an effective and efficient way of assisting SRLs to understand their rights and obligations at law'.²⁹³ NLA noted that the services were based on a National Protocol which 'is dated and it is suggested requires review'.²⁹⁴ NLA also noted that the provision in the Protocol that the duty lawyer only attend upon an SRL on one occasion, although subject to the duty lawyer's discretion, is based on assumptions by the agencies which developed it, on the following basis:

²⁹¹ The participants are the Commonwealth Attorney-General's Department, National Legal Aid, FCA, FCWA and FCC.

²⁹² Commonwealth Attorney General's internal document and commentary by Legal Aid Program Section.

²⁹³ Hunter et al, above n 70, 445, cited by National Legal Aid 'Comment on the Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Draft Report 2014) 21.

²⁹⁴ National Legal Aid, above n 254, 22.

- It is not considered appropriate to continue to provide assistance to SRLs at the expense of making grants of aid to those who would be eligible;
- The court environment is a pressured one; there are competing demands and time is limited;
- Matters are often complicated and often require more comprehensive assistance than that which can properly be provided by a duty lawyer service; and
- Some SRLs are persistent, and applications may be brought which are without merit.²⁹⁵

NLA indicated that these assumptions might need to be revisited, based on the reality experienced by duty lawyers that some SRLs have multiple and complex problems which require more than one attendance.²⁹⁶ Moreover, there were increasing numbers of SRLs who might have been ineligible on the grounds of means but clearly did not have the capacity to pay a private lawyer, and many of these people faced obstacles which militated against them continuing unrepresented. NLA did not dismiss the Productivity Commission's suggestion that duty lawyer services, in some cases, may be subject to a user contribution for 'unbundled services for SRLs who can afford it',²⁹⁷ but drew attention to the need to assess the cost of administering and collecting the contribution against the expected efficiencies to the family law system. NLA commented that duty services generally achieved efficiencies of cost associated with fewer grants of aid and reduced court time.²⁹⁸

While difficult to quantify, it is argued that the Scheme is likely to be making overall savings for Legal Aid²⁹⁹ and increasing the efficiency of the family courts. Duty lawyers reduce the workload of the registry staff; assist judges to progress matters through the court in a more timely manner, and in diverting

²⁹⁵ Ibid.

²⁹⁶ Coumarelos et al 2012, above n 37.

²⁹⁷ Productivity Commission, above n 277 vol 1, cites Coumarelos et al 2012, above n 37.

²⁹⁸ Ibid 6.

²⁹⁹ PwC, Economic Value, above n 37, 15.

SRLs from the courts by referring them to ADR and preventing the commencement of or continuation of unmeritorious proceedings.

If any of the reforms to the Scheme suggested by this study are to be considered, the Protocol will need to be amended. NLA seems to accept the Productivity Commission's recommendations that changes to the Scheme are likely to be made and that changes to the Protocol will be required.

The Protocol will be discussed further in Chapter V, dealing with the interpretation of the results to reveal how much the Protocol shapes the way duty lawyers do their work and to what degree duty lawyers follow the guidelines in the Protocol.

H Other duty lawyer schemes

(i) Duty lawyer schemes in Australia

Although some studies have dealt with duty lawyers operating in the criminal jurisdiction,³⁰⁰ none has been identified which has looked at duty lawyer schemes across family and criminal law to draw similarities or contrasts between the schemes. While both schemes operate as early intervention strategies, the roles and often the range of experience of practitioners are very different. This, in turn, can have very diverse effects and outcomes for SRLs.

At face value, the criminal and the family law duty lawyer both provide summary legal services on the occasion when an SRL's matter is in court. However, the areas of law serve different, incompatible purposes.³⁰¹ Whereas the criminal law

³⁰⁰ Beattie, above n 263. This review discusses funding issues for Legal Aid Queensland and notes that there is 'widespread concern within the legal profession that the fees ... are inadequate and that this has had a negative effect on the level of representation available to indigent accused'. ... 'juniorisation ... raises questions about the quality of work being funded by LAQ', xiii.

³⁰¹ Clare Huntington, 'Repairing Family Law' (2008) 5 (5) *Duke Law Journal* 1245. Huntington notes the love/hate relationships of former partners, particularly in children's disputes, and says there needs to be more awareness of and effort made to recognise the negative

jurisdiction is public law enforced through a system of punishment or other sanctions, family law involves people's private lives and is concerned to help people with 'repairing their lives' post-separation.³⁰² The fundamental difference is that in a family law dispute the duty lawyer works within the less adversarial model to provide possible options to litigation and promote settlement. As stated in a Canadian report, 'family law issues are complex and may entail, on an everyday basis, more emotion, engagements and crisis whether material, personal or social, than criminal law matters'.³⁰³ In general, the scope of the family law duty lawyer's role is wider than that of the criminal duty lawyer, who may simply assist SRLs to get an adjournment, enter a plea or make an application for bail.

(a) The significance of *Dietrich v The Queen* for family law matters

As has been discussed, the Federal Government's funding cuts in the mid-1990s resulted in drastically reduced legal aid budgets.³⁰⁴ The decision in *Dietrich* had implications for the wider issue of legal aid funding. New Commonwealth Legal Aid Guidelines issued after *Dietrich* indicated that funding for criminal law matters was mandatory whereas 'funding of family law matters [was] discretionary'.³⁰⁵ There was recognition that women already faced barriers when accessing justice, and that prioritising of criminal over family law matters resulted in men becoming the overwhelming beneficiaries of legal aid.³⁰⁶ Although the Commonwealth Government stated it would be addressing these concerns through a national women's justice strategy, a change in government

emotional impact of family law litigation and repair relationships which need to continue in parenting children.

³⁰² Rhoades, above n 6, 17; Allan, above n 6.

³⁰³ Nova Scotia Department of Justice, The Summary Advice Counsel Project: A Proposal for Assessing Implementation and Future Directions in Two Nova Scotia Urban Areas (draft copy 2006), 1.

³⁰⁴ See Chapter I: Section B (i) and (ii); also see Senate Legal and Constitutional References Committee above n 135.

³⁰⁵ Zdenkowski, above n 265; George Zdenkowski, 'Defending the Indigent Accused in Serious Cases: A Legal Right to Counsel' (1994) 18 *Criminal Law Journal* 135; Nicholson, above n 40.

³⁰⁶ Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report 69 (Part I) (1994) [4.15]; also see Sally Kift, 'The Dietrich Dilemma' (1997) 13 *Queensland University of Technology Law Review* 211.

in 1996³⁰⁷ resulted in the existing funding arrangements not only staying in place, but being subjected to a funding cap for family law matters.

In the criminal jurisdictions the focus has been on the marginal increase in legal aid funding since the 1980s, resulting in accused who cannot afford legal representation being unrepresented at trial, even in cases of serious crime where there is a high possibility of imprisonment.³⁰⁸ In *Dietrich* the High Court considered that an unrepresented accused could not have a fair trial unless he or she had access to legal advice.

The High Court decided that only in exceptional circumstances would a trial for a serious criminal offence be fair where the accused was unrepresented because they could not afford to pay a lawyer.³⁰⁹ The High Court did not expand upon what constituted a 'fair trial' but did identify the importance of the accused having 'legal representation' as an aspect of it.³¹⁰ The High Court indicated that the representation be 'competent' but, again, gave no guidance to determine standards of competency.³¹¹ Later decisions clarified that it was not the job of the trial judge to 'embark upon a detailed exercise of assessing the relative degrees of competence and experience of lawyers potentially available to act for an accused person'.³¹²

³⁰⁷ The Australian Labor Party which had been in government for five terms was defeated in 1996 by the opposition Liberal Party of Australia and its Coalition partner, the National Party of Australia.

³⁰⁸ See *McInnis v The Queen* (1979) 143 CLR 575.

³⁰⁹ *Dietrich v The Queen* (1994) 177 CLR 292 [299] per Mason CJ and McHugh, Deane and Gaudron JJ held that although an accused who cannot afford legal representation does not have a right at common law to a publically funded lawyer, the accused has a right to a fair trial.

³¹⁰ *Dietrich v The Queen* (1994) 177 CLR 292 [345] per Dawson J.

³¹¹ Zdenkowski, above n 305, 146.

³¹² *AG (NSW) v Milat* (1995) 37 NSWLR 370. The accused was refused leave to appeal to the High Court; see *Milat v AG for NSW* (1995) 20 Leg Rep C3 per Dawson, Toohey and McHugh JJ. In *Milat*, the trial judge considered the decision in *Dietrich* given the accused's application that his trial would be unfair. Legal aid had been approved, but the accused refused the appointed lawyer and sought to obtain other legal representation. The court found that the principle in *Dietrich* rested on the fact that legal representation was not available to the accused, whereas in *Milat*, the argument was that the accused had legal aid and competent representation.

The High Court confirmed that an accused person is not entitled, as of right, to a publicly funded lawyer. However, it is a person's right to have a fair trial; therefore, when a person accused of a serious offence and at risk of imprisonment appears unrepresented, there is a right to have the matter adjourned to allow the accused to obtain legal advice to allow the matter to proceed to trial.³¹³

The significance of *Dietrich* for the current study is that although it focused on the principles of fairness at the trial stage, the implications were that LACs could fulfil their obligation to provide representation and advice to an accused for an adjournment through use of a duty lawyer until full representation was made available for the trial. In a subsequent decision, it was made it clear that there was no possibility of any other court extending the principles to pre-trial matters or civil proceedings.³¹⁴ This was particularly relevant in relation to family law matters where, as previously noted, the FCA had expressed concern that reductions in legal aid funding might result in SRLs not getting a fair trial.³¹⁵ This concern extended to the consideration that the decision in *Dietrich* meant that scarce legal aid funds were directed towards the criminal jurisdiction and away from family law matters.³¹⁶ The significance of this diversion was that it set up the assumption that criminal matters are more 'serious' than family matters and that the consequences in criminal cases are more dire than a child's living arrangements or the protection of a child from risk of abuse or neglect.³¹⁷ In a case soon after *Dietrich*, the Family Court said:

³¹³ *Dietrich v The Queen* (1994) 177 CLR 292 [19].

³¹⁴ See *R v Matterson; ex parte Helfenbaum* (1993) 2 Tas R 115 where the Supreme Court did not allow an application for a stay in committal proceedings on the basis of a lack of legal representation and refusal to grant the accused legal aid. The court distinguished this case from the *Dietrich* case because the stay was sought in relation to preliminary proceedings and not at trial. The Court's finding that *Dietrich* did not apply to pre-trial proceedings was confirmed in *Fuller v Field and South Australia* (1994) SASR 112 and in *NSW v Canellis* (1994) 181 CLR 309 at 328; also see Zdenkowski, above n 265, said 'Although the ruling [in *Dietrich*] fell short of a legal imperative to provide legal aid ... in practical terms it had this effect', 3.

³¹⁵ *Sajdak v Sajdak* (1993) FLC 92-348 [79].

³¹⁶ Australian Law Reform Commission, *Managing Justice*, above n 30 [4.15]; also see fn 88.

³¹⁷ In *Re K* FLC (1994) 92-461 [80] the Full Court of the Family Court set out guidelines for the appointment of a separate representative for children pursuant to s65 of the *Family Law Act*

Issues concerning the welfare of children are no less important in a civilised legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court to be essential to the administration of justice [*Dietrich v R*]. The provision of appropriate legal assistance in children's custody cases is equally as vital.³¹⁸

In 1998, Dewar commented that legal aid funding cuts in 1997 had compromised the legal system's inability to protect the rights of vulnerable people:

Although there are now signs of a willingness at government level to articulate a clear policy direction for legal aid, it is striking how conventional notions of a level playing field seem now to have been explicitly abandoned. Instead, government policy seems to be to approach these substantive issues of fairness by oblique means — through the language, for example, of accountability, accessibility and quality' of government-funded services [which] lead us to ask whether the new language of governmental efficiency, transparency and quality control, proves to be an adequate aspirational substitute for the old (ideal of preventing the oppression of the weak by the strong at either the collective or individual level).³¹⁹

These comments resonate today. Legal aid budgets remain under pressure. The question of whether it is possible to create a level playing field in an

1975 (Cth), taking account of the requirements of Articles 9 and 12 of the United Nations Convention of the Rights of the Child. This decision ensured that in cases where a judge was satisfied that the guidelines required the appointment of a separate representative, LACs were required to fund that appointment. Note that the Family Court has no power to order that the Commissions fund the appointment. However, in that way, even if one or both parties were unrepresented, when a Separate Representative was appointed they appeared at any stage of the proceedings. Clearly, the Separate Representative cannot give parties legal advice. However, in cases where SRLs are involved, they are being increasingly relied upon by judges to give SRLs procedural advice and, at trial, assist the court by providing opening and closing submissions and conducting examination and cross-examination first. This is particularly helpful to the trial judge when the SRL is the applicant. Where there are allegations of family violence, the Separate Representative's cross-examination of the alleged victim may cover many or all the issues the alleged perpetrator wishes to explore and thereby either eliminate the need for further cross-examination or, at the very least, limit its extent. See Chapter IV: Part III: D.

³¹⁸ *McOwan v McOwan* (1994) FLC 92–451 at 80,691.

³¹⁹ John Dewar, *Family Law and its Discontents* (Inaugural Professorial Lecture 1999), 45, <https://www.griffith.edu.au/__data/assets/pdf_file/0018/314604/dewar99.pdf>;

adversarial system remains topical.³²⁰ Reports and reviews focus on the efficiency measures which LACs need to undertake, and be mindful of, in providing services, and note that one of the most cost-efficient and effective services which commissions provide are duty lawyer services.³²¹

(b) The comparative roles of criminal and family law duty lawyers

In 2012, the Law and Justice Foundation of New South Wales conducted a survey on the access to justice and legal needs of disadvantaged people.³²² The survey indicated that around half the respondents experienced one or more legal problems over a twelve month period and around a third had experienced a civil legal problem in the previous five years. One of the most common legal problems involved criminal matters.³²³ As the 'crucial initial interaction phase [with a criminal duty lawyer] can, to a large extent, determine the future "life chances" of a defendant while in, and when eventually expelled from, the criminal justice system',³²⁴ the implications of an incorrectly entered plea of guilty or a poorly executed plea in mitigation are either an appeal to a superior court or serious consequences for the defendant.

In an article critiquing criminal law duty lawyer schemes, Beattie argued that a criminal duty lawyer, on average, spends less than ten minutes interviewing a

³²⁰ Faulks, above n 58, 3. Faulks says that 'when a dispute involves one party who is self-represented and another who is represented by legal practitioners, this appears to create an 'unlevelled' playing field. This in turn raises issues 'about the fairness of the legal process facilitated by the court' (citing Justice Richard Stewart, 'The Self-Represented Litigant: A Challenge to Justice' (2011) 20(3) *Journal of Judicial Administration* 146, 155. Faulks concludes that 'it might be said that the 'playing field' of litigation is never truly level, even when both parties are represented' (depending upon the skills and competencies of the lawyers). However, the field is more markedly uneven in cases where a lay-person is on one side and a qualified practitioner is on the other,' 4. Also see Bernie Mayer, 'What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate, 2011 Edition,' *Marquette Law Review*, Spring 2012 (95) 3, 859-872. Mayer argues 'There is no such thing as a level playing field' and that the court culture and dynamics almost always advantage one side or another. This is even more so in the case of people who represent themselves, 860.

³²¹ Productivity Commission, above n 275; PwC, *Economic Value*, above n 37, 15.

³²² Coumarelos et al (2012), above n 37.

³²³ Ibid.

³²⁴ Henry M Levin, 'Education Life Chances and the Courts: The Role of Social Science Evidence' (1975) 39 (2) *Law and Contemporary Problems* 217. Levin defines 'life chances' as 'the ability to participate fully in the social, economic and political life of society,' 217-240.

defendant and approximately 57 seconds on a guilty plea submission;³²⁵ and that duty lawyers had developed a decided trend towards an 'assembly line process of appearance, plea and sentence, which is characteristic of Magistrates' Courts'.³²⁶ Beattie noted that this compromises the effectiveness of the duty lawyer and leads to less favourable outcomes for the defendants, and concluded that 'there is at least a prima facie case made out against the efficacy of the duty solicitor scheme'.³²⁷

The problems identified by Beattie existed prior to the legal aid cuts in the mid-1990s. Reports dealing with views from the private profession undertaking legal aid work after the changes to legal aid indicate that as the amount of funding provided for legal aid grants was inadequate, many firms chose to do less legal aid work. Those who continued did so in high volumes and assigned the work to 'newly minted lawyers'.³²⁸

Having less experienced practitioners may not result in different outcomes for defendants for simple matters such as adjournments, but an inexperienced practitioner, receiving instructions at the last minute and with an extremely short amount of time, may not ask the right questions to explore fully the defendant's circumstances. This may mean that all relevant information in relation to a plea is not put before the court; and an application for bail or a more lenient sentence for a plea may be refused.³²⁹ The LAW Survey indicated that of those with a

³²⁵ Beattie, above n 263, 75–84.

³²⁶ Ibid, 83.

³²⁷ Ibid, 84.

³²⁸ Dennis Beaver, *Newly Minted Lawyers Can be a Risk to Their Clients*,

< http://hanfordsentinel.com/news/opinion/columnists/you-and-the-law-newly-minted-lawyers-can-be-a/article_055d4da2-01c9-11e1-8490-001cc4c03286.html>. Beaver notes that legal education does not equip lawyers with practical skills and that by not doing an 'apprenticeship' or if not supervised by a senior lawyer, lawyers are 'often clueless' about how to work effectively with clients or how to practise law. Beaver cites Gideon Grunfeld on his website called Lawyersonaleash.com that in the current economic climate, firms are reluctant to take the time or the chance to develop young lawyers and many are starting up their own practices. Grunfeld concludes 'this all means an increased likelihood of malpractice and harm'.

³²⁹ See Abel, above n 34. Abel cited reports in the USA stating that 'indigent criminal defendants in state criminal cases in New York City receive ineffective assistance from lawyers' because firms 'offer only minimal salaries and the quality of defending advocates will suffer', 324. Abel comments that the restriction of legal aid by the UK Government gives the impression that

family law problem, about half said that at least one of their legal problems had a 'severe' or moderate impact on their everyday life; about a quarter also had a criminal legal problem; and multiple legal problems were common. Around ten per cent of respondents accounted for more than half of the number of legal problems.³³⁰ As has been pointed out, people's needs in family law matters are 'more complex than in criminal justice because of the many possible responses'.³³¹

In criminal matters, the assistance sought by SRLs is summary. As Beattie pointed out, the time a duty lawyer gives to each of these matters is extremely limited. Criminal duty lawyers deal with volume. It is not unexpected that they handle many clients and matters in one call-over list in the Magistrates' Court, necessitating a short amount of time with each client.³³² Lawyers in private practice do not usually 'dabble in legal aid' in the court as it is not commercially viable.³³³ Although the general principle may be true that failing in an application to secure a person's bail, or that mitigating factors not being comprehensively put to the court, may result in a person remaining in gaol or receiving a harsher sentence, these applications are not made in a vacuum. The prosecution makes submissions and recommendations and the judge decides on the strength of the facts and evidence. The fact that the duty lawyer may have little time to take complete instructions or make a 'gold standard' application does not necessarily result in long-term consequences. The defendant can make a bail application on another occasion; the judge can ask for pre-sentencing reports to be

the Government has 'absolutely no regard for civil liberties or the rights of accused people', and. quotes a member of the Commons Standing Committee considering a Bill to introduce a universal scheme for legal aid applications, that an accused who 'would be stuck with the duty solicitor ... will be grateful that someone is there,' citing Minister Hoon, 355.

³³⁰ Productivity Commission, above n 277, vol 1, cites Coumarelos et al 2012, above n 37, 32.

³³¹ Beattie, above n 263, 75–84.

³³² Legal Aid Commission of Tasmania *Annual Report 2014–2015* (2014) Chairperson's Report notes that 'duty lawyer services increased by 17%' over the previous year with 2,973 services provided, 24. Services for the criminal and the family duty lawyer were not separated; however, in the 2012–2013 Annual Report, criminal duty lawyers provided 2,348 sessions, a 15% decrease from the previous year, and the family law duty lawyer service provided 73 services in Hobart and 46 in Launceston/Devonport/Burnie.

³³³ Alastair Grigor, 'Practice Profile: Criminal Lawyers Say Real Life Practice is Far From Prime Time', *Lawyers Weekly*, 24 August 2011, <<http://www.lawyersweekly.com.au/news/9052-practice-profile-criminal-lawyers-say-real-life-pr>>.

prepared to assist their deliberations. This is not the situation in the family courts where decisions made at an interim hearing have long term consequences. Parties who enter into Final Consent Orders after an interim hearing based on perceptions of how long a matter may take to trial and find their agreement is unworkable may have difficulty returning the matter to court.³³⁴

The need for duty lawyers has been accepted, but the method by which they operate in criminal jurisdictions and the results they (can) achieve have been questioned.³³⁵ It is argued by the researcher that the outcomes for SRLs involved in family law matters can be as serious and life-changing as in the criminal jurisdiction, with far-reaching effects on the lives of children and their parents. A decision made at an interim hearing that a child remain with a parent who has relocated interstate is not trivial and has consequences for the relationship with the other parent, who may wait up to a year for the matter to come to final hearing. Similarly, if a parent has left the state with the child and their location is unknown, a Location Order³³⁶ and Recovery Order must be

³³⁴ *In the Marriage of Rice M A and Asplund C J* (1979) FLC 90–725. The Court’s decision in this case is considered to have established a ‘threshold test’ that must be satisfied before a Court can look behind Final Orders to consider whether any application to vary or suspend the orders is in the child’s best interest. The Court must be satisfied that a substantial change in circumstances had occurred or that important information had not been disclosed when the existing Orders were made. The threshold test is closely connected with the nature of and the degree of change a parent is seeking to make to the Final Orders, and has been applied in numerous first instance and Full Court decisions; see *King and Finneran (formerly King)* (2001) FLC 93–079; *Sandler and Kerrington* (2007) FLC 93–323; *Reid and Lynch* (2010) FLC 93–448.

³³⁵ Beattie, above n 263, 75–84. Also see Edward Cape, ‘From Advisers to Defenders: The Changing Role of Criminal Defence Lawyers and the Educational Implications’ (Social Science Research Network, Abstracts) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=271046>. Cape refers to the duty solicitor scheme operating in England and Wales and notes that early research indicated that duty solicitors ‘were either passive or identified with police rather than the client’, Abstract. This had resulted in the development of an education scheme based on codes of practice designed to improve the standards of duty solicitors. Also see in this thesis Chapter IV: B Part I: 2, where the data from the judiciary indicate that the family lawyer needs to be an experienced and mature practitioner; also see Chapter IV: B Part I: 3, where the Launceston and Hobart duty lawyers discuss the benefits of experience and a solid background in family law.

³³⁶ A Location Order is made under s67M of the *Family Law Act 1975* (Cth). It requires a person or government agency to provide the court with information about a child’s location. Commonwealth information orders are a type of location order (see s67N).

sought at an interim hearing.³³⁷ These are stark examples of the impact which the response at the interim stage can have on children and their families. The duty lawyer can assist SRLs in an application for an urgent Recovery Order, so it is imperative that at this stage the duty lawyer has time to obtain complete instructions and provide advice on a range of options which will likely lead to relatively better outcomes. It may be that a family duty lawyer spends hours, or even a whole day, on one matter.³³⁸

There are similarities in the criminal and family duty lawyer schemes which provide specific assistance to SRLs. Both focus on legal advice and advocacy in the sense of offering representation in court. However, criticism of the criminal scheme has focused on the fact that the limited time duty lawyers give to each matter in itself represents an injustice. In contrast, the time the family duty lawyer spends with an SRL is less constrained, subject to the availability of the duty lawyer and/or the circumstances.³³⁹ It is clear that the total number of people whom a criminal duty lawyer sees in a day far outnumbers those upon whom a family duty lawyer attends.³⁴⁰ It is argued later in this chapter that

³³⁷ Family Duty Lawyers can represent parties in defended Interim proceedings in, for example, Location and Recovery Applications, which have profound implications for a person in relation to determining their immediate future and, potentially, the final outcome of the matter. See *Goode and Goode* (2006) 36 Fam LR 422; 206 FLR 212; [2006] FamCA 1346. *Goode and Goode* was the first case to be heard by the Full Court of the Family Court after the 2006 amendments to the *Family Law Act 1975* (Cth) through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* in relation to the correct principles to be applied in interim parenting decisions. The case sets out the legislative pathway that must be followed in the conduct and determination of interim parenting cases. The significance of this case is that a decision made at the interim stage may have long-lasting and profound effects in determining with whom the child lives after the final hearing. This is particularly the case in jurisdictions where there are long delays in matters coming to trial, see fn 357.

³³⁸ See Chapter IV: B Part I: 3 (b) (ii): Interview: LDL.

³³⁹ *Protocol*, above n 8. The Protocol does not place constraints upon the duty lawyer's time. Attendances are at the duty lawyer's discretion and according to the circumstances of each case.

³⁴⁰ Legal Aid Commission of Tasmania *Annual Report 2014–2015* (Legal Aid Commission of Tasmania, 2015) notes that there were a total of 2,973 duty lawyer services during the reportable period. In the criminal jurisdiction, these figures are made up of duty lawyer services provided by at least five criminal law duty lawyers operating state-wide and out-of-hours services provided by the Hobart Community Legal Service (totalling 2,675). The Magistrate's Courts in Tasmania operate daily. In the family jurisdiction, one duty lawyer serves Hobart and one serves Launceston, Burnie and Devonport. The FCA does not hold duty lists on a regular basis. The FCC holds duty lists for procedural matters on the first Monday and Tuesday of each month.

attendances by number should not be the measure of comparison between the criminal and family duty lawyer schemes.

The criminal duty scheme does not offer a comprehensive service. The criminal duty lawyer has no role before seeing an accused on the day the matter is in court and, after the initial contact and regardless of the accused's needs, cannot provide further assistance. Legal Aid advice provided through the duty lawyer is not available for all offences; a person must be at risk of a possible term of imprisonment.³⁴¹

In family law matters, the Protocol allows the duty lawyer to represent SRLs for a comprehensive range of matters, including urgent injunctive applications regarding children.³⁴² The family law duty lawyer offers an enhanced consultation process at any stage of an SRL's dispute. Data from the FCC Annual Report of 2014–2015 indicate that interim applications accounted for 24 per cent of applications coming before the court.³⁴³ This suggests that the family duty lawyer can operate effectively at hearings, the consequences of which may have serious implications for how a matter proceeds.³⁴⁴ These matters can be complex and time-consuming.³⁴⁵ SRLs seeking Recovery Orders may be in an

³⁴¹ Legal Aid Commission of Tasmania, *Guidelines for Grants of Aid* Guideline 4 (i) c. Criminal law priorities (i) (B) 'A person who, if convicted, is likely to receive a sentence involving a period of imprisonment,' 28. These guidelines are consistent with those of other LACs which restrict the number and types of matter eligible for legal aid.

³⁴² *Protocol*, above n 8 [2.3].

³⁴³ Federal Circuit Court, *Annual Report 2014–2015* (2015), Table 3.4, family law applications filed by type indicate that there were 17,685 applications for Final Orders (21% of total applications filed) and 21,112 for Interim Orders (24% of applications filed). The majority of applications (53%) are for Divorce, which is generally filed by applicants in person using DIY kits.

³⁴⁴ See *Goode v Goode* [2006] FamCA 1346; (2007) 36 Fam LR 422. The Full Court identified the process for the determination of interim proceedings for parenting order matters. Although the Protocol does not provide that the duty lawyer appear at interim hearings [2.4], Recovery Applications and injunctive proceedings are, by their nature, interim applications and are afforded hearing time by the court as appropriate to the circumstances of the proceedings. Duty lawyers in Tasmania have appeared in relation to urgent Recovery Applications.

³⁴⁵ PricewaterhouseCoopers, ('PwC') 'Criminal and Family Law Private Practitioner Service Model' (Report for the Law Institute of Victoria, October 2015) compared criminal and family law duty services, using the assumption of one hour for each duty lawyer service and noting that the time for family law matters could be more as the estimation did not take account of complex matters, 16.

emotional state and have difficulty providing clear and concise instructions. The duty lawyer takes on multiple functions and dedicates the time to comfort, advise, take instructions from and, if necessary, draw documentation for SRLs.

Recovery Orders are time-consuming matters as they involve third parties.³⁴⁶ These are complex applications and it is vital that they are clearly drafted and that the correct service is afforded to all parties involved.

A comprehensive affidavit needs to accompany all applications. The FCC's fact sheet provides information on the process and notes that 'your chances of recovering the child will improve if you [include in your affidavit] as much information as possible to help authorities find and return the child'.³⁴⁷ It can take a duty lawyer all day to assist in the preparation of these documents and conduct a hearing. This attendance is recorded by duty lawyers in terms of the time taken to attend *one* SRL.³⁴⁸ These are not activities with which the criminal duty lawyer has to deal.

Another differentiating factor between the two jurisdictions is that evidence in the family courts is taken on affidavit. Although the FCA does not require an affidavit with an Initiating Application, the FCC does. Both courts also require additional forms and notices to accompany applications or responses and consent orders where there have been allegations of family violence or abuse or unacceptable risk to the child/ren.³⁴⁹ Family law is document-driven, with

³⁴⁶ A Recovery Order is defined in s67O of the *Family Law Act 1975* (Cth). The orders request that the Marshall of the Court, all officers of the Australian Federal Police and all state and territory police officers find and recover a child/ren to the person in whose name the order is made. The police may stop and search any vehicle, vessel or aircraft and enter and search any premises or place in which they have reasonable cause to believe the child/ren may be found.

³⁴⁷ See Federal Circuit Court of Australia Fact Sheet: Recovery Order, which describes what a Recovery Order is, who can apply, and what happens if a child is or is not located and recovered. The Fact Sheet has related information on applications to be made if a child is taken overseas. <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/family-law/recovery-orders>>.

³⁴⁸ The LACT duty lawyers commenced recording the time taken for each attendance in mid-2015, as a result of the initiatives of the researcher in the action research; see Chapter IV: Part II: C: 2 and 3 (d).

³⁴⁹ As of 12 January 2015, all applications seeking parenting orders where there are allegations of family violence or child abuse under ss67Z (2) or 67ZBA (2) of the *Family Law Act 1975*

generally lengthy affidavits. Interim hearings are conducted solely on the documents and submissions, with a two hour time limit. The importance of correctly framed orders and relevant material in affidavits cannot be overstated.

Although the courts' websites provide publications and fact sheets, there is always the proviso that these services do not take the place of a lawyer and that SRLs need to understand that they accept responsibility for completing the correct forms and include relevant and important information, and ensure that documents are served on all respondents involved in the matter.³⁵⁰ There are multiple separate entries on how to affect correct service. The matter will be adjourned, if the other party or parties have not been served.

Although neither the FCA's nor the FCC's web page has a separate entry for SRLs, a search with the keywords 'how to start an application in family law' brings up an Initiating Application Kit ('Kit') as the first listing. That reference, and several after it, are all for the FCA. A non-lawyer may be confused that the instructions on how to complete the Kit state that the application may also be

(Cth) are required to be accompanied by a Notice of Risk. The Notice must contain specific details clearly particularised of the alleged abuse or risk or abuse or family violence or risk of family violence. The Notice fulfils the court's obligations under s69ZQ (1) (aa) of the *Family Law Act 1975* (Cth); see *Federal Circuit Court Rules 2001* (Cth) r22A.02. In the event that the Notice contains information for child welfare authorities, they must also be served with a copy of the Notice, either by the party making the application or a copy provided by the Registry Manager. If such applications are settled by way of Consent Orders, pursuant to r13.04A, a form is required to be attached to the Consent Orders. This form explains to the court how the allegations of child abuse, neglect, family violence, mental health, drug or alcohol abuse or any other risk to the child have been dealt with in the Consent Orders. The Court will determine whether the proposed agreement is appropriate in all the circumstances and does not expose the child to an unacceptable risk of harm. See Federal Circuit Court, Application-Draft Consent Parenting Orders and allegations of abuse or family violence, http://www.federalcircuitcourt.gov.au/wps/wcm/connect/e5024fec-47ac-4235-a024710377bdda3c/applicationparenting_FCC_1013V1.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=e5024fec-47ac-4235-a024-710377bdda3c.

³⁵⁰ There were 44 subject headings on the FCC website under Reports and Publications in relation to Family Law. There were 38 court forms on the website. Each of the subjects and court form pages contained information and multiple links to other forms, procedures and processes and links to other websites. There are similar and different forms and information sources on the FCA website. The forms are in alphabetical order. To commence proceedings, a party needs to file an Initiating Application, which appears halfway down the page. The form can be downloaded but does not contain information on how to do this. This information is contained in an Initiating Application Kit, which is the next document in the list and contains details of the Notice of Risk. It is *not* clear where an SRL can find a Response to Initiating Application except to look to a Response form in the list which caters to all applications in family law and child support proceedings.

filed in the FCC, as the reason for filing in the different courts is not stated. Similarly, there is no explanation why all the references to the requirements to complete the application for filing in the FCC refer to the *Federal Circuit Court Rules 2001*.

The FCC home page appears in the middle of the search listings. The search does not take the user directly to an Initiating Application. An SRL may not know which application should be filed in which court, given that both courts deal with family law matters. The online information assumes that lay people know what they want before they start searching for it. This supports the views of previous studies and the comments of judges³⁵¹ who have expressed concern that the proliferation of online resources and self-help kits may serve to obscure rather than inform, and point out that they are not a substitute for face-to-face legal advice.

Considerable research considers the difficulties experienced by SRLs in drafting documents, noting that better prepared documents are more likely to result in the matter proceeding efficiently.³⁵² Even if the duty lawyer is well resourced with a computer, photocopier and printer, and able to utilise in-house precedents,³⁵³ these matters can be intensive and take hours.³⁵⁴ In some cases, documents are hand-written. However, the problem with not providing

³⁵¹ Julie Grainger, 'Litigants in Person and the Civil Justice System—Learning from NZ, the US and the UK' (Report: The Winston Churchill Memorial Trust of Australia, 2013); also see Chapter IV: Part I: B.1.B Interviews with Judges.

³⁵² Cate Banks, 'Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane' (Cate Banks Consulting, June 2013). This report listed preparation of court forms and documents as one of the top three barriers for SRLs in navigating the family law system; Richardson, Sourdin and Wallace, above n 49, 82; Richardson, Sourdin and Wallace, above n 92, 32; Gamble and Mohr, above n 43; Family Law Council, Litigants, above n 1; Dewar, Jerrard and Bowd, above n 44, 65.

³⁵³ As at September 2016, neither duty lawyer in Tasmania had these resources. Both lawyers had an iPad which was not connected to the Legal Aid intranet site or to a printer. A proposal that the offices be fully resourced has been put to the Director (see Chapter VI, Recommendation B.I.1).

³⁵⁴ South Australian Attorney-General's Department, Office of Crime Statistics and Research, *Evaluation of the JusticeNet Self-Representation Service Pilot*, February 2015, reported findings from solicitors who commented that preparing documents was 'more time-consuming than they expected', 4. Also see Chapter IV: Part I: B.1.C Interview: LDL, who commented on being in court 'all day' if the matter 'grew legs'.

SRLs with advice or assistance to ensure appropriately drafted orders and relevant information in affidavits is that the matter will either be adjourned to allow amended documentation to be filed or, in the worst of circumstances, result in the application being dismissed. In deciding whether to make a Recovery Order, the court is guided by general principles and considerations regarding what is in the best interests of the child,³⁵⁵ and the primary consideration of children having a meaningful relationship with both parents.³⁵⁶ This is a particularly difficult decision when considering a Recovery or, in response, a Relocation Application.³⁵⁷

Whatever order is made in a Recovery Application, it will have serious consequences in separating a parent from their child, potentially for a considerable period of time, until the matter is determined at final hearing. This is a particularly important consideration if the parents live in different states or in a jurisdiction where the waiting time for a final hearing is two or more years.³⁵⁸ It can be said that the seriousness of a decision in the family courts at the interim stage can determine the future 'life chances'³⁵⁹ of all parties involved. SRLs

³⁵⁵ *Family Law Act 1975* (Cth) s60B.

³⁵⁶ *Family Law Act 1975* (Cth) s60CC.

³⁵⁷ See *A v A: Relocation Approach* (2000) FLC 93-035.

³⁵⁸ Heath Aston and Simone Ziazaris, 'Caseloads Leap as Judges Retire, Forcing Long Wait for Family Law Cases', *The Sydney Morning Herald*, 6 November 2014. This article notes that children's matters in the FCC in Sydney can take up to three years to finalise. The article cites Chief Judge John Pascoe of the FCC, the Law Council and family lawyers who said that courts were 'struggling to keep up with their caseloads' and the situation was expected to get worse with the anticipated retirement of 12 judges, almost one-fifth of the FCC's 65 judges dealing with family law matters. Also see Michaela Whitbourn, 'Family Court at Breaking Point: Delays Leave Children at Risk,' *The Sydney Morning Herald*, 16 October 2015. This article cites the NSW Law Society, which warned that the FCA and the Family Law Division of the FCC 'are at breaking point'. Cases in the Family Court can take three years for a trial date to be allocated, with the median time to trial being 18.4 months. The delays are similar in the Brisbane registry: Nicola Berkovic, 'Federal Court Put in Charge of Stretched Family Court System,' *The Australian Business Review*, 2 December 2015. This article reports on the Government introducing a bill to put the FCC in charge of running the much larger Family and Federal Circuit courts 'as delays and underfunding bring the family law system close to breaking point'. The article quotes CJ Pascoe: 'The general federal work of the court is growing, the family law work is getting harder and we are not getting timely replacements. The article indicates that these changes were the result of a review conducted by KPMG that revealed the three federal courts would have combined losses of \$75m by 2017–18. The article noted that the FCC had handled 95,341 applications in 2014 whereas the Family Court had handled only 20,397.

³⁵⁹ Levin, above n 324, 217.

may be less likely to be successful in their applications and more likely to have their matter dismissed.³⁶⁰ The intervention of the duty lawyer in these difficult matters may shorten the time the matter takes in court as it is more likely that it will be handled more efficiently.

To summarise the differences between the criminal and family law duty lawyers, the workload and time constraints of criminal and family law duty lawyers entail the provision of different services to SRLs. Criminal duty lawyers may see more people and spend little time on many matters, mainly providing representation. Family law duty lawyers may see fewer people but perform a broader range of services. They often assist SRLs over long periods during the day on which their matter is in court. Whereas criminal duty lawyers may see repeat offenders on numerous occasions, they do not provide the type of assistance whereby the SRL can continue to represent themselves as their matter becomes more complex. Family duty lawyers may attend on fewer people but provide information, advice and referrals to non-legal services, help SRLs draft documentation, represent them in court, participate in negotiations with the other party's lawyer and, if there is a settlement, prepare Consent Orders.³⁶¹ A family duty lawyer's focus, therefore, is on getting a matter to progress to the next stage and, hopefully, to reach resolution.

One other aspect which explains why the criminal duty lawyer service is used more than the family duty lawyer is the level of publicity and awareness. Although the family duty lawyer service came into operation in 2005, it seems to have a limited profile.³⁶² The criminal duty lawyer service has been established for over 30 years and, in Tasmania, is available in every Magistrate's Court.³⁶³ It

³⁶⁰ Gamble and Mohr, above n 43.

³⁶¹ *Protocol*, above n 8 [2.2] outlines the assistance provided by the duty lawyer, also [2.3] for recovery orders and urgent injunctions regarding children.

³⁶² A brochure on the Family Law Duty Lawyer Scheme was not produced in Tasmania until June 2014, see Chapter IV: Part II: C: 3 (g) and (h) for information on the brochure.

³⁶³ Criminal duty lawyers appear in every state and territory court of summary jurisdiction (Magistrates' Court, County Court, District Court or Court of Petty Sessions). In metropolitan areas they are either in-house legal aid duty lawyers or, in regional and remote areas, the services are sent to tender and performed by private practitioners. The Australian Bureau of Statistics, *Criminal Courts, Australia, 2013–14*, Table 1 notes that the Magistrates' Courts

is also prominent on every legal aid, community legal service and legal assistance website dealing with criminal law matters and, if it is not afforded a separate fact sheet or information page,³⁶⁴ it is listed as the first duty lawyer service provided by Legal Aid. The family duty lawyer service is not so well publicised or known about outside the court and the legal profession.³⁶⁵ This may reflect the reality that the funds available for legal aid in family law are what is 'left over after the prior demands of the criminal defence budget have been met'.³⁶⁶ It is not claimed by the researcher that the reduced budget for family law results in a decline in the standard of service: indeed, it is contended that experienced family law duty lawyers work differently from criminal lawyers by providing SRLs a range of services designed to enable them to continue with the matter through the court. It is in recognition of these services that reports have recommended the extension of the Scheme.

accounted for 92% (534,607) of all finalised defendants while the Children's Courts and Higher Courts accounted for 5% (29,597 defendants) and 3% (14,941 defendants) respectively <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0>>; Also see Magistrates' Court of Tasmania *Annual Report 2013–2014* (2015). Court statistics set out matters lodged from 2010–14 which involve multiple complaints filed against a single defendant on the same day. In 2010 there were total of 25,311 matters; in 2011 23,471, in 2012 19,272 and in 2013 18,918. These statistics do not include Family Violence Orders which account for almost 1000 applications lodged each year. There were 16 Magistrates constituted as of 30 June 2014, while there was one Judge of the FCA and two Judges of the FCC.

³⁶⁴ Legal Aid Western Australia, Duty Lawyer Service has a separate page for the duty lawyer in the Magistrates Court or Children's Court. The family duty lawyer is under the heading of Family, relationships and children and has a link to the Family Court Services (duty lawyer). The Legal Services Commission of South Australia has separate pages for the criminal and the family duty lawyer service. Most other LACs list all duty lawyer services on the same page and usually list the duty lawyers under 'Help at (or Going to) Court'. For example, Legal Aid Commission of Tasmania has a separate page for the Magistrates' Court and the Family Court and lists the duty lawyer services available at each, <<http://www.legalaid.tas.gov.au/need-help/going-to-court/>>.

³⁶⁵ See Chapter IV: B.I.A, Tables 24; 25 and 26 dealing with the awareness and visibility of the duty lawyer from the SRL's point of view.

³⁶⁶ Abel, above 34, 319. Productivity Commission above n 277, vol 1, 32, 38 reports that 'While criminal matters make up a relatively small share of all legal disputes, they attract a large proportion of legal assistance resources. Priority is given to criminal law issues not just because of the consequences these matters have on people's lives, but also because of the discipline imposed by the courts to do so. 'Criminal courts can, and do, stay proceedings involving indictable offences where parties are unrepresented. No such discipline exists in the civil space'. 32 The report identified that one of the problems confronting LACs was the lack of resources generally, combined with a focus on representation for criminal matters, leading to an under-provision of services for civil law matters.'

(ii) Duty lawyer schemes and SRLs in an International context

It is worth looking at the literature in relation to duty lawyer schemes in New Zealand, Canada and the United Kingdom to determine whether there are any differences between those schemes and the Scheme in Australia, and what can be learned by making international comparisons. International studies on the subject of SRLs support the findings in local studies exploring the reasons for self-representation and its impact, as well linking the rise in numbers of SRLs to decreasing levels of legal aid funding as well as being linked to the increasing cost of legal services.³⁶⁷

Although the issues in relation to how duty lawyers facilitate access to justice for SRLs raised in Australian studies have been addressed in overseas jurisdictions such as the United Kingdom, Canada and New Zealand,³⁶⁸ there are no directly comparable Family Law Duty Lawyer Schemes. In these countries a duty lawyer service is provided in the criminal jurisdictions by the equivalent of the Australian LACs. In the family law jurisdiction, duty lawyer services are provided through lawyers in private practice. This is in contrast to Australia where most duty lawyers are employed directly by LACs.³⁶⁹

(a) United Kingdom and Wales

In the United Kingdom, the Community Legal Service ('CLS') section of the Legal Services Commission is responsible for family law matters.³⁷⁰ The CLS does not provide a duty lawyer service. Indeed, even though a duty solicitor scheme funded by legal aid has existed in England and Wales in the criminal

³⁶⁷ Department for Constitutional Affairs (UK), *Litigants in person: Unrepresented litigants in first instance proceedings*, DCA Research Series 2/05 (2005).

³⁶⁸ Harry Woolf, *Access to Justice*, above n 82; Richardson, Sourdin and Wallace, above n 91; Smith, Banbury and Ong, above n 165.

³⁶⁹ Some Australian LACs contract out the duty lawyer service to private practitioners in regional or remote areas.

³⁷⁰ The Legal Services Commission is responsible only for England and Wales. In Scotland, the duty lawyer scheme operates only in the criminal jurisdiction.

jurisdiction since 1998,³⁷¹ there is no coordinated national duty lawyer scheme operated by legal aid in the civil jurisdiction. Civil duty lawyers are private practitioners who tender for work through the Legal Services Commission. These schemes offer only 'on-the-day' emergency advice. In 2013, the UK Government made significant cuts to legal aid and community legal centre budgets, the effect of which was that there was a 60 per cent decrease in family cases granted funding and two thirds of cases in the family court featured one self-represented litigant.³⁷²

The impact of legal aid cuts in the UK may have implications for Australia. Genn³⁷³ confirmed that SRLs in the UK now represent the 'norm' in civil matters rather than the exception. Genn's concern was that the diminution in legal aid funding in the UK might be an early warning for Australia and NZ. She pointed out that in the UK, where private practitioners now do all the work which legal aid used to do; there has been a massive escalation in the overall cost of legal aid. To a significant extent these have been escalations in the cost per case, rather than just in the number of cases. Importantly, virtually none of this money is used to support the development of community legal centres or alternative programs, currently available in Australia. Genn argued that one of the effects of privatising legal aid is that there are increasing numbers of SRLs putting strain on existing duty lawyer schemes, with reduced numbers of private practitioners prepared to undertake duty lawyer work.

³⁷¹ The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) removed many types of cases outside the scope of legal aid funding. The only exception is in cases where there is documentary evidence that a person has suffered domestic abuse. Commentators argue that these reforms have led to increased numbers of SRLs, with a negative impact on the efficiency of the family courts. See Gabrielle Garton Grimwood, 'Litigants in person: the rise of the self-represented litigant in civil and family cases' (House of Commons Library, 27 February 2015).

³⁷² Civil Justice Council, *Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice* (November 2011); Judiciary of England and Wales, *The Judicial Working Group on Litigants in Person: Report* (July 2013) recommends modifying procedural rules to allow proceedings in which at least one party is a litigant in person 'by way of a more inquisitorial form of process' 33.

³⁷³ Hazel Genn, 'Do-it-Yourself Law: Access to Justice and the Challenge of Self-Representation' (Keynote speech, 'Assisting Unrepresented Litigants—A Challenge for Courts and Tribunals' Conference, Sydney, 15–17 April 2014).

A recent report reviewing the UK cuts noted that there was a ‘sharp increase in the number of unrepresented’ litigants in the family courts and that there had been a ‘reduction in expertise and fewer [private] practitioners willing to enter the field’. One of the effects was that where initially the Government had proposed that there be 250 duty lawyer contracts offered, the number was increased to over 500.³⁷⁴

(b) New Zealand

In New Zealand, the Ministry of Justice funds the Legal Services Agency which administers legal aid and provides a duty lawyer service in criminal matters. The main function of criminal duty lawyers rostered at courts of summary jurisdiction on duty list days is to represent those charged with an offence who would otherwise be unrepresented. These schemes are limited because duty lawyers can give very little time to each person beyond the initial appearance. In the event the person requires additional assistance, he or she is referred either to legal aid or to private practitioners.³⁷⁵ Although research by the Ministry of Justice on SRLs in both the criminal and family jurisdictions found that there were increasing numbers of SRLs and an unmet need for legal services in family law matters, there was no specific recommendation that a duty lawyer service similar to that operating in the criminal jurisdiction be extended to the family courts.³⁷⁶

In a recent study of SRLs in New Zealand, Toy-Cronin investigated situations in which people represented themselves in the Family, District or High Court. Toy-Cronin’s research focused on the reasons for self-representation and, through

³⁷⁴ Monash University, *Access to Justice: A Comparative Analysis of Cuts to Legal Aid*, Report of the Monash Warwick Legal Aid Workshop, The University of Warwick (2014) 4.

³⁷⁵ New Zealand Law Commission Reports, ‘Delivering Justice for All: A Vision for New Zealand Courts and Tribunals’ [2004] NZLCR 85, 41. This report cites Gabrielle Maxwell, Allison Morris and Jeremy Robertson ‘The First Line of Defence: The Work of the Duty Solicitor’ (Legal Services Board, Wellington, 1994) and says that ‘despite expansion of the scheme to increase both numbers and the time available—most duty solicitors (in the criminal jurisdiction) operate under considerable pressure and often have only a very brief consultation with the defendant before an initial court appearance’, 73. This is consistent with the earlier criticism by Beattie, above n 263, 75–84.

³⁷⁶ Smith, Banbury and Ong, above n 165.

interviews and in-court observations and review of court documents, investigated SRLs' experiences and how other participants in the court system responded to SRLs.³⁷⁷ Interviews with judges and court staff revealed that 'many expressed a desire to expand the duty solicitor service, which currently provides summary advice only to criminal defendants, to parties in family or civil matters'.³⁷⁸ The study recommended a range of policy reforms and presented a view of SRL's motives being more complex than the stereotypes which had been sketched in a great deal of the literature.³⁷⁹

Although noting that many thought a 'duty solicitor' would be helpful, Toy-Cronin did not look to the Australian Scheme as a model to assist SRLs. Instead, she referred to 'a clinic-based service ... like that operating in Queensland', namely the Queensland Public Interest Law Clearing House Self-Representation Services ('QPILCH SRS').³⁸⁰ This recommendation is surprising, given that Toy-Cronin stated that 'education about legal rights is no substitute for good legal advice and representation'.³⁸¹ As the SRS does not offer representation, there is a limit to the assistance it can deliver in comparison with the services provided by a duty lawyer.³⁸² Toy-Cronin's conclusion that 'there must be more face-to-face advice services available for court staff to refer Litigants in Person ('LiPs')³⁸³ to' describes precisely the role duty lawyers perform. Moreover, the 'power imbalances' and 'bullying',³⁸⁴ which Toy-Cronin identified that LiPs have experienced in negotiations when the other party is represented, can be

³⁷⁷ Bridgette Toy-Cronin, *Keeping up Appearances: Accessing New Zealand's Civil Courts without a Lawyer* (PhD Thesis, University of Otago, Dunedin, 2015).

³⁷⁸ Ibid 142–143 and 241.

³⁷⁹ A point also made by Sourdin and Wallace, above n 228.

³⁸⁰ Toy-Cronin, above n 377, 241, citing Tony Woodyatt, Allira Thompson and Elizabeth Pendlebury 'Queensland's Self-Representation Services: A Model for Other Courts and Tribunals' (2011) 20 *Journal of Judicial Administration* 225.

³⁸¹ Toy-Cronin, above n 377, 244.

³⁸² The Productivity Commission commented throughout the final report that duty schemes offered a greater range of services than the QPILCH SRS, see above n 275, vol 1 & vol 2. Similarly, VicLA in their review of family law services compared the relative benefits of QPILCH SRS and recommended that the duty lawyer service model delivered by LANSW's EIU be trialled as a way of providing greater assistance to SRLs, see above n 95

³⁸³ Toy-Cronin, above n 377, 53. Toy-Cronin uses the term 'Litigant in Person' to describe any person who had a matter in court but did not have a lawyer on the court record as representing them at some point of their case.

³⁸⁴ Ibid 248.

ameliorated when a duty lawyer is involved. Toy-Cronin called for a ‘cultural change in attitudes to LiPs’³⁸⁵ within the New Zealand legal community to recognise the barriers they face and to help them through the legal process.

In comparison with New Zealand, the Scheme in Australia goes a long way to providing SRLs access to legal advice, information and representation, in a way which may not overcome all the difficulties of self-representation but does offer an effective and more holistic service to meet their needs.

(c) Canada

In Canada the Department of Justice funds the duty counsel service³⁸⁶ in the criminal jurisdiction through the use of private practitioners. In family matters the Canadian situation is complicated by the fact that there is no unified family court system and no specialist judges who hear only family law matters.³⁸⁷ However, there is a duty counsel available to assist SRLs in some family courts in some provinces. In Ontario unrepresented litigants can access the service of a duty counsel in the Provincial Court (Family Division) which deals with issues of ‘custody and access’,³⁸⁸ but duty counsel is not available in the General Division of the Family Court which deals with property proceedings. A recent report on Family Law Legal Services noted the necessity of providing ‘early intervention and assistance’,³⁸⁹ and recommended the expansion of the duty counsel service to all types of family matters with a panel of duty counsel specifically to deal with SRLs.³⁹⁰ Unlike the Australian model where the LACs employ duty lawyers as designated lawyers to the family courts, the duty counsel scheme in

³⁸⁵ Ibid 250, citing Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013).

³⁸⁶ The term ‘duty counsel’ is used in Canada to denote a lawyer, usually employed by the Department of Justice to offer legal advice and assistance services to SRLs appearing in the Family Court Division.

³⁸⁷ Law Commission of Ontario, ‘Cost Benefit Analysis of Family Service Delivery, Disease, Prevention and Treatment, Family Law Process Project’, Final Paper (June 2010).

³⁸⁸ These terms are used in the Ontario *Family Law Act*, RSO 1990, c.F.3, Definitions, 1 (1).

³⁸⁹ Michael Trebilcock, ‘Family Law Legal Aid Services, Report on the Legal Aid Review 2008’ (Faculty of Law, University of Toronto, 2008) 5.

³⁹⁰ Ibid 7.

Ontario, for example, operates with no continuity in duty counsel, who do not have a permanent presence in the courts.³⁹¹

In 2006, an evaluation was conducted of two Summary Advice Counsel ('SAC') initiatives in Nova Scotia.³⁹² It examined the SAC model to determine both whether the duty counsel service was meeting its objectives and the impact of the model on the functioning of the court and other court services. The evaluation's methodology was to review the literature and conduct face-to-face and telephone interviews with identified stakeholders.

The SAC model arose after consideration of the benefits provided to SRL in Nova Scotia's provincial criminal courts³⁹³ and a successful pilot of the duty counsel service provided through Nova Scotia Legal Aid to the Family Division of the Supreme Court. In 2004, the SAC project was established at the Family Division in Sydney and Halifax. The evaluation compared the services in both regions and sought to identify the advantages and disadvantages of the services to make recommendations for reform of the service.

It is not within the scope of the current study to discuss the findings of the evaluation in any detail, except to note that they are similar to those in this study in that all participants involved in the family law system considered that SRLs face serious problems. All those associated with the duty counsel were positive about its value.³⁹⁴ The recommendations were that the SAC program be extended to provide more duty counsel services.

The SAC model has objectives similar to the Australian Scheme: to improve access to justice for SRLs by providing them with free advice and to act as a

³⁹¹ Anne-Marie Langan, 'Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario' (2005) 30 *Queen's Law Journal* 825, 832.

³⁹² Don Clairmont and Ian Joyce, *The Summary Advice Counsel Initiative: Assessing its Implementation Impact and Future Directions in Two Nova Scotia Urban Areas* (Dalhousie University, 2006). 'Summary Advice Counsel' is the term used for duty lawyers in the civil (family law) jurisdiction.

³⁹³ Ibid.

³⁹⁴ Ibid 88.

referral service to other sources.³⁹⁵ It operates on a 'first past the post basis',³⁹⁶ which means the duty counsel is precluded from seeing both parties to a dispute and on a 'one shot' basis'.³⁹⁷ The significant points of difference are that the SAC duty counsel only gives legal advice, does not offer representation in court, and limits the time with an SRL to half an hour.³⁹⁸

These points of differentiation make the SAC model similar to the services offered by QPILCH and therefore not strictly comparable to the Australian Scheme. It is interesting to note that one of the judges interviewed in the Canadian study said, 'I would love it if he/she could attend court hearings — that would be wonderful ... it would save the court giving legal advice'.³⁹⁹ That the National Protocol does not limit the duty lawyer's time with an SRL, that it is at the duty lawyer's discretion whether he or she provides services on more than one occasion, and that SRLs can be represented in court, suggests that the Scheme provides more benefits to SRLs and the court than the SAC model.

Other legal service models in Canada were trialled in which duty counsel not only assisted SRLs with advice and information but represented them in court. In November 2002, lawyers from Calgary Legal Guidance worked as duty counsel in Calgary's family law court to assist SRLs. Duty counsel attended court each day to assist SRLs with matters in court;⁴⁰⁰ this approach offered a greater range of services than the SAC. However, Calgary Legal Guidance is an organisation that provides free legal assistance, information and representation through the use of volunteer lawyers, operating on similar lines to QPILCH. It is not a crisis agency. Nor does it any longer provide duty counsel services in the family court, perhaps because of diminished resources or funding.⁴⁰¹ Regardless, it demonstrated the initiatives taken and the difficulties

³⁹⁵ Ibid 25.

³⁹⁶ Ibid 106. This is the term used to mean 'first come first served'.

³⁹⁷ Ibid 49.

³⁹⁸ Ibid.

³⁹⁹ Ibid 49.

⁴⁰⁰ Michelle Christopher, 'Unrepresented Litigants in Family Courts' (December 2003/January 2004) *LawNow* 45.

⁴⁰¹ See Calgary Legal Guidance, <<http://clg.ab.ca/programs-services/family-law-program>>.

involved in managing a service for SRLs which met their needs within current and manageable resources.

One of the most comprehensive studies of SRLs in Canada was conducted by Macfarlane.⁴⁰² This study commenced in 2013 and continues to collect data on the experience of SRLs in civil courts in Alberta, British Columbia and Ontario.⁴⁰³ Macfarlane and her team interviewed 259 SRLs and 107 service providers from the three provinces. Of particular note is that the majority of SRLs (60 per cent) were involved in family law litigation. The reason most people represented themselves was that they could not afford 'to retain, or to continue to retain, legal counsel'.⁴⁰⁴ The findings about the expectations and experiences of SRLs corresponded with the findings of most studies on SRLs in the family law jurisdiction in Australia. Macfarlane noted:

Some SRLs began with a reasonable sense of confidence; others began with trepidation. However, within a short time almost all the SRL respondents became disillusioned, frustrated and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.⁴⁰⁵

Macfarlane's report contained valuable feedback from SRLs on 'duty counsel'⁴⁰⁶ which confirmed criticism of schemes that are available only on the day an SRL's matter is in court and are time-limited:

While many SRLs appreciated the assistance they received from duty counsel ... the study also found dissatisfaction with the most common model of delivery in the summary legal service model. While this model works well for some SRLs, others find a time-limited opportunity to speak with legal counsel leaves them more confused, and even panicked than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for

⁴⁰² Macfarlane, above n 71.

⁴⁰³ The National Self-Represented Litigants Project has a webpage dedicated to updating commentary and initiatives for SRLs: <<https://representingyourselfcanada.com/>>; Julie Macfarlane also has a Facebook page with daily posts on interesting events, articles and information: <<https://www.facebook.com/NationalSelfRepresentedLitigantsProject/>>.

⁴⁰⁴ Macfarlane, above n 71, 529.

⁴⁰⁵ Ibid 9.

⁴⁰⁶ In Canada, a lawyer who is either employed by, or receives payment from, Legal Aid and assists SRLs is referred to as 'duty counsel'.

reassessment of how to offer the maximum value to the maximum number of SRLs via the summary advice model.⁴⁰⁷

Macfarlane reported a comment from an interviewee and what she noted ‘may be a very unfair criticism ... made by a significant number of SRLs, that ‘Duty counsel – I think they are punished by being there. ... the service they provide is dismal at best, confusing at worse, really no use at all’. Macfarlane added ‘while these comments may be unfair given the stress that duty counsel ... often work under, it is also the case that many in this group are relatively junior lawyers gaining experience – and managing a 30 minute interview with an anxious and often emotional SRL is a challenging task for even the most experienced lawyers’.⁴⁰⁸

The literature draws attention to the problems SRLs experience in working through the family law system regardless of where they may be. Macfarlane’s report indicated that the assistance of duty lawyers is valued by SRLs, but is limited.

The National Self-Represented Litigants Project (‘NSRLP’) maintains a blog which provides updates on a variety of projects and initiatives on SRLs.⁴⁰⁹ Macfarlane provides commentary in the blog about the accessibility of each province’s justice system, support networks for SRLs and, more recently, reference to an analytical tool that contains data on case outcomes when SRLs are involved.⁴¹⁰ Macfarlane says that the data on outcomes at the early stages of proceedings ‘shows just what you would expect — SRLs do not fare well

⁴⁰⁷ Macfarlane, above n 71, 13.

⁴⁰⁸ Ibid. 87.

⁴⁰⁹ The National Self-Represented Litigants Project Blog, <https://representingyourselfcanada.com/category/blog/>.

⁴¹⁰ The National Self-Represented Litigants Project Blog, <<https://representingyourselfcanada.com/2014/05/25/duty-counsel-un-plugged-how-we-need-to-evolve-public-legal-services-to-respond-to-the-srl-phenomenon/>>. On 18 April 2016, Macfarlane posted an item titled ‘Finally, Canadian Data on Case Outcomes: SRL vs Represented Parties’. The blog refers to data from decisions going back 20 years for all family law cases decided in the Ontario Superior Court (family division). It offers outcome details of cases where one party was unrepresented and the other not, between 1 January 2012 and 7 April 2016. The NSRLP also has a Facebook page which regularly posts articles, links and news items on access to justice issues see <<https://www.facebook.com/NationalSelfRepresentedLitigantsProject/>>.

against represented parties’.⁴¹¹ However, she notes that the data on SRLs at trial indicate that they fare better. Macfarlane questions whether the poor outcomes experienced by SRLs at motions or directions hearings are a result of procedural mistakes or because judicial officers may lack patience with an SRL’s inability to present their case. Macfarlane posits that SRLs may have better outcomes at trial because judges pay more attention to the substantive arguments, and comments that, beyond the obvious,⁴¹² the data raise ‘important access to justice’ questions.⁴¹³

The data on outcomes at the procedural stage confirm research which has revealed that SRLs are overwhelmed by the court’s processes and their applications are likely to be dismissed or adjourned to allow them to amend documents.⁴¹⁴ The role of the duty counsel in providing assistance at this early stage can progress matters through the court to ensure that an SRL’s case is determined on its merits. This will alleviate the stress SRLs’ experience as they struggle through the legal system, and may improve outcomes at the procedural stage.

Macfarlane’s final report on the National Self-Represented Litigants study contained data from interviews she conducted with 12 duty counsel in Ontario, Alberta and British Columbia. In a blog written in 2014, Macfarlane was gracious in her admiration of the duty counsel.⁴¹⁵ She cited duty counsels’ opinions which endorsed previous findings on the impact of self-

⁴¹¹ The NSRLP Blog, above n 409. The results showed a 96% success rate of private counsel against SRLs.

⁴¹² Ibid. Macfarlane says ‘you would assume of course that legal counsel would do a better job than someone without legal training trying to present their own case (and emotionally invested in the outcome).

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ NSRLP Blog, above n 409. The blog also contains an article of 2 May 2014 titled ‘Access to Justice All-Stars: Family Duty Counsel Team’ (Windsor, Ontario). The NSRLP nominated the Family Duty Counsel team for an award in recognition of ‘how hard the team worked to assist the sometimes overwhelming number of people looking for their help’. The team is mentioned as an example of the ‘great synergy and effective co-operation between duty counsel and court staff (and) an important antidote to the “many-headed advice monster” that we heard so many SRLs complain about nationally’.

representation.⁴¹⁶ Duty counsel stressed the need to see SRLs as early in their case as possible, and were aware that giving SRLs ‘10 or 15 minute(s) ... at a time of crisis, with their ex giving them the hairy eye in the hallway’ made it difficult to deal with all aspects of a case. Duty counsel also said that they would like ‘longer time periods for meetings’.⁴¹⁷ Macfarlane’s findings from SRLs echoed those of the duty counsel: they were dissatisfied with the ‘time limited’ nature of the service.⁴¹⁸

While it is not surprising to hear these views from duty counsel, their role in the Canadian family law system is different from that of family duty lawyers in Australia, who are not constrained by time and can offer representation in court: both of these are important examples of assistance to SRLs that go beyond most of the Canadian model.

Other Canadian studies looking at improvements in service delivery to SRLs in the family courts have recommended the extension of duty counsel services with more duty counsel being available more often than the day of an SRL’s court event, and providing a greater range of services.⁴¹⁹

(d) Other jurisdictions

In a study of SRLs in the civil justice system in New Zealand, the United States and the United Kingdom, Grainger compared strategies used in dealing with SRLs in Australia with these overseas jurisdictions. She found in 2013 that ‘many of the strategies [overseas] are more sophisticated and further developed than strategies currently used by Australian courts and tribunals’.⁴²⁰ Although the report did not deal in any great way with family matters, it claimed that the

⁴¹⁶ Erin Chesney, Julie Macfarlane and Susan Rice, ‘Tracking the Continuing Trends of the SRL Phenomenon’ (Data from the National Self-Represented Litigants Project 2014–2015).

⁴¹⁷ NSRLP Blog, above n 409.

⁴¹⁸ Macfarlane, above n 71, 13.

⁴¹⁹ Clairmont and Joyce, above n 392; Trevor et al, Addressing the Needs of Self-Represented Litigants in the Canadian Justice System’ (A White Paper Prepared for the Association of Canadian Court Administrators, Association of Canadian Court Administrators, Toronto and Edmonton 2012) (Farrow et al). Also see Chapter II C of this thesis.

⁴²⁰ Grainger, above n 351.

ideal justice policy is one where 'an access to justice approach builds up from the availability of information and ends up with the funding of lawyers — not the other way round'.⁴²¹ This approach maintains the principle that legal representation is still the ideal, whereas it is arguable from Australian developments that access to justice for SRLs in family law cases might be achievable in a combination of the Scheme and the family court system working together.⁴²²

Grainger's paper outlined best practice methods in Australian courts and tribunals for dealing with SRLs. It identified as a deficiency, for example, that Australian courts do not have strategies for helping SRLs use technology but provide all forms and documents online.⁴²³ The report recommended that more DIY kits be provided for simple matters,⁴²⁴ but emphasised that online resources are not helpful to disadvantaged people who do not have access to technology or have a poor understanding of the information provided on self-help internet sites.⁴²⁵

In relation to family law matters, Grainger's report is supportive of 'Face-To-Face Self Help Centres' which exist in the United States, and recommends that

⁴²¹ Ibid 68.

⁴²² Macfarlane, above n 71, says that 'there was a widespread feeling that some lawyers were less interested than they should be in resolution. Instead, there were frequent observations of aggressive and adversarial behaviour by counsel' 45. This is in contrast to how children's matters are currently dealt with in the family courts under the Less Adversarial Trial process where the judge can become more involved in the proceedings.

⁴²³ Grainger, above n 351. FCA and FCC have extensive fact sheets/publications/forms/practice directions etc. on-line and provide access to computer terminals in all registries.

⁴²⁴ See FCA and FCC DIY, Divorce Kit; DIY Consent Orders Kit and other do-it-yourself kits ('DIY'), <<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/>>.

⁴²⁵ Also see Coumarelos et al (2012), above n 37, 44 where it is suggested that 'self-help strategies are unlikely to be quality substitutes for legal advice and assistance when people have poor legal capability.' Coumarelos cites studies which found that self-help strategies 'should not be seen as stand-alone services ... [they] may sometimes be more effective as a component of a suite of legal services'; Jeff Giddings and Michael Robertson, "'Informed Litigants with Nowhere to Go": Self-help Legal Aid Services in Australia' [2001] 26(4) *Alternative Law Journal* 184–190; Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Hart, 2001); Rosemary Hunter, Cate Banks and Jeff Giddings, 'Technology is the Answer ... But What was the Question? Experiments in the Delivery of Legal Services to Regional, Rural and Remote Clients' (2009) in Pascoe Pleasence, Alexy Buck and Nigel Balmer (eds), *Transforming Lives: Law and Social Process* (Stationery Office, London 2007), 133–160.

Australian courts and tribunals with high numbers of litigants in person should consider establishing self-help centres ... in conjunction with law schools that run clinical legal placement subjects and with solicitor and barrister pro bono organisations.⁴²⁶

The type of centre referred to by Grainger may be similar to the QPILCH.⁴²⁷ Grainger's recommendation to establish self-help centres has been supported by Toy-Cronin who, in her research into SRLs in New Zealand, emphasised the importance of face-to-face advice.⁴²⁸

(e) Summary

The Australian Family Law Duty Lawyer Scheme has significant advantages over the international schemes in that it is a co-ordinated national scheme which offers continuity, uniformity and stability as it is offered through state and territory LACs. It is governed by one document, the National Protocol, and decisions in relation to its operation are made through the consultative arrangements set out in the National Partnership Agreement. There are designated duty lawyers at all family courts, which allows them to establish excellent working relationships with judges and court staff. This makes it easier for SRLs to find, or be referred to, a duty lawyer. A single entry point can also give the SRLs confidence that the duty lawyer at the court has the knowledge, skills and experience to ensure they receive appropriate advice or referrals in relation to their matter. The Protocol does not limit the amount of time a duty lawyer can attend to an SRL, which is a significant advantage when dealing with

⁴²⁶ Grainger, above n 351, 19–27.

⁴²⁷ Jeff Giddings, Blake McKimmie, Cate Banks and Tamara Butler, 'Evaluation of Queensland Public Interest Law Clearing House Self-Representation Service', Griffith University (2014) Self-represented Litigants, Paper 3. <<http://www.civiljusticee.info/srl/3>>. QPILCH is an independent, not-for-profit, community-based legal organisation that coordinates the provision of pro bono legal services in Queensland. It operates a Self-Representation Service which provides free legal advice and assistance to SRLs throughout the course of their proceedings. Its volunteer solicitors offer discrete task assistance generally on only one occasion. Ongoing assistance is determined by the merits of the case, the needs of the applicant and the capacity of QPILCH to assist. QPILCH solicitors do not represent the SRS clients in court. <<http://www.qpilch.org.au/cms/page.asp?ID=60872>>.

⁴²⁸ Bridgette Toy-Cronin, 'Walk a Mile in My Shoes: Understanding SR Litigants' Experiences' (Paper presented at the Australian Institute of Judicial Administration Conference, 'Assisting Unrepresented Litigants—A Challenge for Courts and Tribunals' (Sydney, 15–17 April 2004).

emotional persons. Moreover, the researcher and the Launceston duty lawyer are experienced practitioners who provide advice before court, represent SRLs in court and explain the outcome after a court event. The clinic service conducted by the duty lawyers⁴²⁹ offers a range of advice and assistance at different stages of an SRL's proceedings. These services go beyond those provided by the SAC model in Canada. They represent a more effective use of the duty lawyer service which Macfarlane recommends as possible modifications of the SAC by making it sufficiently flexible that SRLs can be provided with advice prior to their matter coming to court, representing them in court and extending the time available to assist SRLs.⁴³⁰ The Scheme offers all these services by experienced duty lawyers.

The creation of the EIU in NSW demonstrates that the Scheme is sufficiently flexible to allow changes to be made without the need to amend the National protocol. It is with this in mind that the recommendations in this thesis are made, with the consideration that they may also be introduced into other jurisdictions, enhancing the service to SRLs and improving their access to just outcomes.⁴³¹

I Conclusion

This chapter has established the background which explains the growing numbers of SRLs in the Family Courts and the significant challenges self-representation has posed for the courts. It explains why SRLs pose problems for the courts and how the courts have sought to manage SRLs, including early intervention strategies and the introduction of the Family Law Duty Lawyer Scheme to operate nationally as a cost-effective model for dealing with SRLs and assisting court efficiency. Finally, the chapter looked at different duty lawyer

⁴²⁹ See Chapter II C for a discussion on the clinic services offered by LACT at the family courts each Monday from 1pm to 3pm. The duty lawyers provide advice, information and assistance to SRLs without a time restriction. They also help them prepare and amend SRLs' documents.

⁴³⁰ Macfarlane, above n 71, 88–90.

⁴³¹ Forell and Cain, above n 284, 33.

schemes to understand the similarities and differences between other models and the Scheme.

The next chapter deals with research conducted after the implementation of the Scheme.

Chapter Two

The Family Law Duty Lawyer Scheme in operation

A Introduction

The previous chapter reviewed the relevant literature relating to SRLs in the family courts and provided an overview of the responses made to the problem of the rising number of SRLs. This chapter examines the more recent literature to follow the progress of the Scheme since 2005. It looks at the Scheme's evolution over time, how it works in practice, and the recommendations made about its further development and expansion. It examines reviews of the legal advice and assistance environment after 2005 conducted on behalf of National Legal Aid,¹ professional legal body interest groups,² the Australian Government³ and law reformers.⁴ The reviews took a microeconomic approach to evaluating how access to justice should be delivered. This contextualises the research method adopted for this thesis, which is explained and justified in Chapter III.

¹ PricewaterhouseCoopers, ('PwC') 'Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law' ('Economic Value') (Report for National Legal Aid, 2009).

² PricewaterhouseCoopers, ('PwC') 'Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism' (November 2009) ('Legal Aid Funding'); Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions* (2014) 1–100 ('Allen Consulting') This report contains background material on legal aid funding and cost comparisons of services provided by LACs.

³ Allen Consulting, *ibid*; Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, 495 ('Productivity Commission').

⁴ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia-Wide Survey: Legal Need in Australia' (Law and Justice Foundation of New South Wales 2012) ('Coumarelos et al 2012').

B Reports on the legal aid system with a focus on microeconomic analysis

The problem of ensuring that access to the legal system is 'fair, simple, affordable and accessible'⁵ for SRLs via legal aid continued to be debated after the introduction of the Scheme, with a number of reviews taking a microeconomic approach to evaluating how access to justice could be best delivered.⁶ In the main, the focus of reviews of the legal assistance sector used the same criteria as apply to markets where the performance of services are assessed against their effectiveness in managing with limited resources. It has been argued that access to justice extends beyond the economic situation and that funding arrangements should be more user-centred than provider-centred.⁷ An examination of the recent reports through the lens of how they address the research questions is undertaken in this chapter to understand how the Scheme assists in providing access to justice and how the reports consider the Scheme meets the needs of SRLs.

1 PricewaterhouseCoopers: Economic Value of Legal Aid (2009)

In 2009, PricewaterhouseCoopers ('PwC') provided an analysis of, and attributed values to, legal aid services.⁸ The PwC report concluded that it was generally acknowledged that SRLs imposed a cost on the Family Court, compared with represented cases, although the cost had not been quantified.⁹

⁵ Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce, Attorney-General's Department, Commonwealth of Australia (2009), Foreword; quotation from the then Federal Attorney General, Robert McClelland.

⁶ PwC, Legal Aid Funding, above n 2; Allen Consulting, above n 2; Productivity Commission, above n 3, vol 1, 495.

⁷ Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System* (July 2012). Also see Trevor Farrow, Diana Lowe, Martha Simmons and Bradley Albrecht, 'Self-Represented Litigations: Addressing the Needs of Self-Represented Litigants in the Canadian Justice System' (A White Paper Prepared for the Association of Canadian Administrators, Toronto and Edmonton (2012), ('Farrow et al') for a Canadian perspective.

⁸ PwC, Economic Value, above n 1.

⁹ Ibid 29.

Given that National Legal Aid ('NLA') commissioned the report, it is not surprising that its emphasis was to show that legal aid services provided a benefit and value beyond the costs of providing the services. The report found that 'benefits also accrue to individuals and the community from quality and effective justice outcomes and resolutions of matters, reached with the assistance of legal aid services'.¹⁰ The report concluded that there 'is a strong economic case for appropriately and adequately funded legal aid services based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government'.¹¹

The PwC report used quantitative data to measure the services that legal aid provides, primarily in the form of costs saved as a result of those services. It presented case studies and potential outcomes of the benefits or avoided costs, and sought to demonstrate how effective justice outcomes play a role in returning significant benefits. It concluded that the provision of legal aid should not be considered the only factor that would bring about such results but that it did play an important role in improving outcomes for disadvantaged people who could not afford to pay the costs of litigation.

The report specifically looked at duty lawyer services, and found that the efficiency cost percentage of case cost to the court system decreased by five per cent when a duty lawyer was involved at any stage of the proceedings.¹² The report approached the subject by looking at the 'inefficiency due to lack of duty lawyers'.¹³ Applying a 'reasonableness test', it concluded that 'in the absence of duty lawyers, inefficiency (of the courts) would increase by five per cent'.¹⁴ The report conceded that this figure had been arrived at 'in the absence of any empirical evidence that quantifies the benefits they [duty lawyers]

¹⁰ Ibid.

¹¹ Ibid ix–x.

¹² Ibid 35–36.

¹³ Ibid 29.

¹⁴ Ibid 35. The number of matters for family law representation was 4,519 (20% efficiency cost) and 995 duty lawyer matters representing a 5% efficiency cost.

provide'.¹⁵ PwC used the model of Legal Aid Queensland to compare the costs of providing family law services through in-house practice and by the duty lawyer. It was evident that the unit cost per file of in-house services was almost seven times the duty lawyer costs.¹⁶ The report concluded that it makes economic sense for the Government to fund duty lawyer services in addition to in-house services as they provide 'incremental efficiency benefits to the court system'.¹⁷

Clearly, NLA has a responsibility to justify the costs of the provision of legal aid services as well as to bring to the Government's attention the need to increase legal aid funding. However, the PwC report stressed that beyond the pure economic justification for, in particular, duty lawyer services, these services provided an efficient early intervention measure which improved access to justice for SRLs, benefited the community, and assisted in the efficiency of the legal system as a whole. This view stemmed from one of the key points that legal aid funding is 'in accordance with [Australia's] international obligations and commitments to ensure social inclusion'.¹⁸ This argument harks back to the comment made by (then) Chief Justice Gleeson in 1999: 'Providing legal aid is costly. So is not providing legal aid'.¹⁹

2 PricewaterhouseCoopers: Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism (2009)

In 2009, PwC also produced an analysis of legal aid funding in Australia, jointly commissioned by the Australian Bar Association, the Law Council of Australia, the Law Institute of Victoria and the Victorian Bar.²⁰ The emphasis of this second report was very different from the one prepared for NLA — in fact, the

¹⁵ PwC, Economic Value, above n 1.

¹⁶ Ibid 30. The report notes that family law in-house representation costs were \$4,143 per file compared with \$615 for the duty lawyer.

¹⁷ Ibid 36.

¹⁸ Ibid 12.

¹⁹ Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, October 1999).

²⁰ PwC, Legal Aid Funding, above n 2.

findings are very similar to comments made by the Law Council as far back as 2000²¹ and again in 2004,²² that fewer private practitioners were undertaking legal aid work due to the low rates, that there needed to be more legal aid funding, and that 'existing arrangements [be] supplemented by lump sum incentives to private practitioners to encourage a specified level of legal aid caseload'.²³

The recommendations were designed to help 'ensure that the system is well equipped to assist disadvantaged Australians through adequate legal representation'.²⁴ The report provided an opportunity for the peak legal bodies to revisit the argument seeking an increase in legal aid funding to maximise the financial benefits for the legal profession.²⁵

While acknowledging that funding for legal assistance services is insufficient to meet demand, the report did little to address the real problem that most people cannot afford to undertake litigation. It did not criticise the high fees charged by lawyers, in particular if the matter proceeded to a court hearing.²⁶ In 2004, (then) Chief Justice Mason said that Australia had 'a first class court system and a first class legal profession [which] are of no avail to a person who cannot afford to access them'.²⁷ In 2012, the Attorney-General George Brandis commented that 'unless you are a millionaire or a pauper, the cost of going to

²¹ Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000), 18–40.

²² Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System', Research Report (February 2004).

²³ PwC, Legal Aid Funding, above n 2.

²⁴ Ibid 9.

²⁵ Law Council of Australia, above n 22.

²⁶ Community Law Australia, above n 7 notes that hourly rates for a lawyer can vary from around \$200 to over \$600 an hour, with further costs involved in disbursements and anything but the simplest legal matter is likely to cost many thousands of dollars with most lawyers asking for a significant up-front payment. This report relied on figures provided in the Attorney-General's Department, *Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce, Attorney-General's Department, Commonwealth of Australia, (2009), 41 which said that average legal costs, including disbursements, of taking a matter to trial in the family courts would be around \$6,500 for applicants and almost \$9,000 for respondents.

²⁷ Anthony Mason, 'PILCH: Access to Justice and the Rule of Law' (Keynote speech delivered at the 10th Anniversary Dinner, Parliament House, Melbourne, 9 September 2004).

court to protect your rights is beyond you'.²⁸ In a submission to the Productivity Commission's inquiry in 2014, Women's Legal Services Victoria noted that a relatively simple family law case involving a trial of fewer than two days was estimated to cost between \$20,000 to \$40,000 and a complex case involving a trial of three or more days between \$200,000 and \$250,000.²⁹

Both PwC reports argued that while full representation by legal aid in a family law matter involving children 'has a net positive efficiency benefit for the justice system',³⁰ it is constrained by the realities that there are insufficient funds to meet demand and strict eligibility guidelines. The reports compared the benefits of duty lawyer services which reach 'a broader group of recipients'.³¹

An underlying theme of these reports is that duty lawyer schemes are economic measures by which LACs provide assistance to SRLs. They recommended that increased funding be provided for these schemes, although their focus was more on the economic efficiencies generated by the duty lawyer schemes than on critically examining the complexity of the legal system which has created the necessity for duty lawyers to exist — or its costs. This raises access to justice concerns; the reports suggested there was no need to address inadequacies in legal aid funding by governments as long as a large number of people accessed certain services. This perspective does not recognise that effective access to justice should rely not simply on reduction of costs through access to lawyers, but rather that duty lawyer services work within the legal aid system as an additional resource to help people deal with their family law matter. While the duty lawyer service can help SRLs, it is not designed to obviate the need for full representation.

²⁸ George Brandis, 'Lack of access an impending social crisis', *The Australian*, 1 June 2012. Brandis was Shadow Attorney-General at the time he made this comment. <<http://www.theaustralian.com.au/business/legal-affairs/lack-of-access-an-impending-social-crisis/story-e6frg97x-1226377846569>>.

²⁹ Women's Legal Service Victoria, Submission 33 to the Productivity Commission; see above n 3, vol 2, 853.

³⁰ PwC, Economic Value, above n 1, ix.

³¹ Ibid.

3 Legal Australia-Wide Survey: Legal Needs in Australia, Access to Justice and Legal Needs (LAW survey 2012)

In 2012, a report was commissioned by the Law and Justice Foundation of New South Wales identifying legal needs in Australia ('LAW survey').³² The report, too extensive to be given a detailed review in this study, provided background on the literature which identified legal problems and the responses by Governments, agencies and the courts to those problems. In particular, it emphasised the need for everyone involved in the legal system to take a more 'holistic approach to justice' by setting priorities for legal service provision and developing 'specifically tailored' and integrated strategies to meet the needs of the most vulnerable groups.³³

This report came soon after survey data were released in 2012 by the Australia Institute showing that 88 per cent of Australians surveyed agreed that 'the legal system is too complicated to understand properly' and 83 per cent agreed that 'only the very wealthy can afford to protect their legal rights'.³⁴

The recommendations in the report that 'a holistic approach to justice requires overcoming the fragmentation across legal and non-legal services, across government sectors and across state/territory and federal governments'³⁵ echoed Sackville's criticism in 2010 of the 'fragmented' approach to meeting people's legal needs as denying people access to justice.³⁶

The results from the survey conveyed the same message as previous literature; despite legislative reforms, initiatives by the courts, self-help kits and a plethora of information available online,³⁷ 30 to 40 per cent of people were appearing

³² Coumarelos et al 2012, above n 4.

³³ Ibid xx–xxiv.

³⁴ Richard Denniss, Josh Fear and Emily Millane, 'Justice for All: Giving Australians Greater Access to the Legal System' (The Australia Institute Paper No 8, 2012), 2, 22.

³⁵ Coumarelos et al 2012, above n 4, xxiv.

³⁶ Ronald Sackville, 'Access to justice: Towards an Integrated Approach' (2011) 10 *The Judicial Review* 232–233.

³⁷ Jeff Giddings and Michael Robertson, "'Informed Litigants with Nowhere to Go": Self-Help Legal Aid Services in Australia' [2001] 26(4) *Alternative Law Journal* 184–190; Merran

unrepresented in family courts at some stage of their proceedings.³⁸ That these numbers remained relatively steady for years³⁹ suggests that the commitment to adopting a more holistic approach to resolving people's legal problems, as embodied in the National Partnership Agreement ('NPA') on Legal Assistance Services entered into by the Commonwealth Government and the states and territories in 2010, may not have resulted in significant benefits to SRLs.⁴⁰

The NPA aimed to resolve legal problems earlier, to better target services to people who most need help, to improve collaboration, and to generate a more strategic national response to the provision and coordination of legal services. While noting that there had been considerable measures taken by legal services providers, the report saw scope for improving the way services were provided to disadvantaged and vulnerable people involved in family law disputes.⁴¹ The survey results also reinforced previous comments that SRLs

Lawler, Jeff Giddings and Michael Robertson, "Maybe a Solicitor Needs to Know that Sort of Thing but I Don't": User Perspectives on the Utility of Legal Aid Self-Help Resources', in Alexy Buck, Pascoe Pleasence and Nigel Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services* (Stationery Office, 2009) 26–46.

³⁸ Coumarelos et al 2012, above n 4. This report concluded that 'In Australia, despite substantial reforms, empirical studies and inquiries on access to justice have invariably continued to recommend further improvements' citing Sackville, above n 36, 221–236, who argued that 'access to justice may be an ideal that cannot be fully realised'. 207. The report noted the latest reform introduced in the UK and recommended introducing a 'more integrated' approach to justice 'that is guided by integrated empirical evidence and evaluation (and) is supported by both state/territory and federal governments and necessitates the injection of substantial resources'.

³⁹ Family Court of Australia, *Annual Report 2012–2013* (Family Court of Australia 2013), figure 3.20 Proportion of litigants' representation status, finalised cases, 2008–09 to 2012–13 and figure 3.21 Proportion of litigants' representation status, trials, 2008–09 to 2012–13. It is notable that the *Annual Report of 2014–2015* continues to make exactly the same statement and records similar proportions as the earlier report, see Figure 3.21, 66

⁴⁰ Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services* (Canberra, 2010, 'COAG'). The agreement was created in accordance with the *Intergovernmental Agreement on Federal Financial Relations* and is part of the Australian Government's broader *Strategic Framework for Access to Justice in the Federal Civil Justice System* program. The parties to the Agreement are the Commonwealth Government and the states and territories. The objective of the NPALAS is to ensure that agencies delivering legal assistance services nationally provide coordinated, integrated services in accordance with access to justice principles of accessibility and equity and through the effective and efficient use of available resources.

⁴¹ Liz Curran, *Ensuring Justice and Enhancing Human Rights: A Report on Improving Legal Aid Service Delivery to Reach Vulnerable and Disadvantaged People* (La Trobe Law, 2007).

were being treated unfairly⁴² and that if people could not access legal advice and information, it created difficulties for them⁴³ and added significant strains on, and increased costs to, the courts.⁴⁴ These results are largely consistent with those in other jurisdictions and with international findings.⁴⁵ There remained a number of challenges for the courts, and barriers for SRLs whose needs were not being met.⁴⁶ The survey emphasised the need to enhance prevention and early intervention strategies 'by more efficiently and comprehensively resolving legal and non-legal problems before they escalate, multiply and resonate in numerous life areas'.⁴⁷

4 The Allen Consulting Group: Review of the National Partnership Agreement (2014)

In 2014, the Allen Consulting Group was commissioned by the Federal Attorney-General's Department to undertake a review of the NPA⁴⁸ and assess how LACs were achieving the objectives and outcomes set out in the NPA. The strength of the resulting report was that it sought to assign responsibility for efficiencies to the legal service providers instead of criticising the government for not adequately resourcing these services. It stated that legal services providers needed to acknowledge that the ever increasing demand for services would not be met with increased funding. Given that the report was

⁴² Matt Crinyion, *Family Law Clients: Client Satisfaction Survey 2007* (Advantage Communications and Marketing, 2007).

⁴³ Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013); Melina Buckley, *Moving Forward on Legal Aid Research on Needs and Innovative Approaches*, Report for the Canadian Bar Association (2010).

⁴⁴ ABC Radio National, 'Self-Representing Litigants', 1 April 2014 (Damien Carrick, citing a comment posted after the program, from Maris Bruzgulis): 'The successful self-representing litigant is like a jackpot winning poker machine player—as rare as hen's teeth and a distraction from the reality of the industry, with a mass of mug punters guaranteeing the exorbitant profits of the clubs and pubs and casinos that only return a pittance to the gambler. Ditto the law industry!'

⁴⁵ Coumarelos et al 2012, above n 4, 205.

⁴⁶ Ibid 207, citing Louis Schetzer, Joanna Mullins and Roberto Buonamano, 'Access to Justice and Legal Needs: A Project to Identify Legal Needs and Barriers for Disadvantaged People in NSW' (Background Paper, Law and Justice Foundation of NSW, 2002).
<<http://www.lawfoundation.net.au/report/background>>.

⁴⁷ Coumarelos et al 2012, above n 4, 241.

⁴⁸ Allen Consulting, above n 2.

commissioned by the Federal Attorney-General's Department, it is not surprising that the message was very similar to that conveyed in the Productivity Commission's report, discussed below.

Reports commissioned for the government are, inevitably, coloured by government policy. The Allen Consulting report looked at the legal services sector as an 'industry' and therefore investigated ways in which that industry could work within a more economically rational, market-based system of service provision. It assumed that legal assistance services have a market value, like services in any other industry, and that measures should be applied to ensure that service providers become more efficient. In that context the report scrutinised duty lawyer services in family law and recommended that they be extended to provide 'discrete task assistance' and 'other services' as part of a 'holistic approach' to reforms of the legal assistance services.⁴⁹ 'Holistic approach' was the catchphrase used in the Legal Australia-Wide Survey discussed in the previous section, released two years prior to the Allen Consulting report.⁵⁰

5 Productivity Commission: Inquiry into Access to Justice Arrangements (2014)

In 2014, the Productivity Commission released a final report on *Access to Justice Arrangements*.⁵¹ It defined 'access to justice' as 'making it easier for people to resolve their disputes'.⁵² The objective was to undertake an inquiry 'with a view to constraining costs and promoting access to justice',⁵³ and the

⁴⁹ Productivity Commission, above n 3, vol 1.

⁵⁰ Coumarelos et al 2012, above n 4.

⁵¹ Productivity Commission, above n 3, vol 1.

⁵² Ibid vol 1, 3.

⁵³ Ibid vol 1, 3.

report's premise in relation to the civil justice system was that it was 'too slow, too expensive and too adversarial'.⁵⁴

The Productivity Commission's report was the most comprehensive investigation into the civil justice system in many years. It provided extremely useful information relevant to this study about the legal landscape, incorporating ideas and issues from an extensive range of sources and making recommendations to reform the legal system. It provided a range of alternatives in relation to family law matters, from support for community legal centres and the unbundling of legal services to increased use of alternative dispute resolution. It looked at whether current measures were effective, particularly in relation to protecting vulnerable parties where family violence was involved. It also considered whether the courts were sufficiently proactive to deter and deal with vexatious litigants and how SRLs with unmeritorious claims could be diverted from the courts.⁵⁵

The report included an extensive section on 'How many people self-represent'.⁵⁶ It distilled previous information on key characteristics of why people appear self-represented and put self-representation into context, arguing that in some courts for particular matters and in particular jurisdictions (tribunals), legal representation should be restricted and that 'more user-friendly arrangements for SRLs would diminish both the need for, and the value of, legal representation'.⁵⁷

Having referred to the submissions by key stakeholders, it dealt with 'how effective are current measures and what more can be done'.⁵⁸ The finding that

⁵⁴ Ibid vol 1, 3. The scope of the report was to collect data from across the justice system 'that would enable better measurement and evaluation of cost drivers and effectiveness of measures to contain these'.

⁵⁵ Ibid vol 1, 426, citing NSW Legal Aid Submission 68, 76. Also see Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Some Self-Represented Litigants-The Dark Side' (2014) Access to Justice. Law and Justice Foundation, Paper 32, <http://www.civiljustice.info/access/3>; Productivity Commission, above n 3, vol 1, 424.

⁵⁶ Productivity Commission, above n 3, vol 1, 424.

⁵⁷ Ibid vol 1, 4.

⁵⁸ Ibid vol 1, 433–440.

one of the barriers that prevented people from pursuing matters was that legal services were too expensive had previously been recognised.⁵⁹ The Chief Justice of the Supreme Court in Western Australia, Wayne Martin, had recently said:

The hard reality is that the cost of legal representation is beyond the reach of many, probably most ordinary Australians. In theory access to the legal system is available to all. In practice access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance.⁶⁰

In an April 2014 interview on the ABC's Law Report following the release of the Productivity Commission report, Commissioner Warren Mundy agreed with the observation by Chief Justice Martin.⁶¹ Indeed, he went further: 'that proposition has been put to us by senior counsel in Sydney who has, in fact, said to us they couldn't afford themselves'.⁶² However, when it was put to Commissioner Mundy that the legal profession should be regulated and fees standardised, he did not agree, saying instead that the profession was able to self-regulate. The Commissioner's reference to lawyers not being able to afford their own fees should have been a signal that, as has been previously noted, the legal system may be at fault and needs changing.⁶³

Commissioner Mundy commented that in family law matters 'there are cases where self-representation can actually be seen as a success of the system because people are able to go to these institutions and get their matters

⁵⁹ The affordability of legal services and its relationship to access to justice has been the subject of many reports which comment on the need to increase legal aid funding and eligibility. See Sackville, above n 37, 234. Reviews of the cost of legal services find that one of the main barriers to people accessing the justice system and the most often cited reason for self-representation was the inability to afford to retain a lawyer. See Macfarlane, above n 43, 8 and 12.

⁶⁰ ABC Radio National, above n 44.

⁶¹ Ibid. Damien Carrick's Interview: Commissioner Warren Mundy.

⁶² Ibid.

⁶³ John Faulks, 'Self-Represented Litigants: Tackling the Challenge' (Paper presented at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013). Faulks refers to the need to 'change the system' to assist SRLs in their interaction with the court system and improve the conduct of litigation when an SRL is involved.

resolved'.⁶⁴ Not surprisingly, the ABC interviewer was intrigued by the thought that people who cannot afford lawyers and have to go through the family law system unrepresented would be considered 'evidence of the success of the system'.⁶⁵ Commissioner Mundy's comment on SRLs in the family court may be interpreted to mean that the family law system has been reformed to the extent where legal representation is not necessary in order to successfully navigate it. This may be the case in extremely limited circumstances, for example, in uncontested and straightforward divorce proceedings where parties complete a DIY kit.

Those recommendations of the Productivity Commission which focused on cost and control aimed to reduce the time and expense associated with litigation and to promote the efficient resolution of civil disputes through increased use of alternative dispute resolution and other early intervention mechanisms.⁶⁶ These measures were designed to increase access to justice by diverting matters that would otherwise become disputes in the courts. Clearly, the findings that the legal assistance sector is underfunded and more funds should be allocated to agencies providing these services are positive ones. However, the emphasis of the report is that these services, and the courts, need to implement efficiency and cost-effective measures. It can be concluded from the report that effective access to justice needs to be measured against reductions in costs and increases in the efficiency of the courts, rather than in the broader terms of 'the enlargement of opportunities for corrective justice'.⁶⁷ The Commission noted that there had been a substantial change in its view between the draft and the final report, which resulted in the inclusion of an additional chapter on family law

⁶⁴ ABC Radio National, above n 44.

⁶⁵ *Ibid.*

⁶⁶ Alternative Dispute Resolution services were designed to offer less costly alternatives to explore a dispute and divert matters from the courts as a way of controlling casework. As such, they were considered to expand opportunities for people to pursue resolution of their disputes. The services formed the core of the 2006 reforms through the creation of Family Relationships Centres.

⁶⁷ Marc Galanter, 'Access to Justice in a World of Expanding Social Capability' (2009) 37(1) *Fordham Urban Law Journal* 115.

matters. It concluded that there were insufficient resources to meet legal need in the family law area.

The recommendations made in relation to family law are relevant to this thesis in so far as they involve the duty lawyer scheme. The report outlined the current problem for SRLs, noting that ‘not all parties are on an equal footing’.⁶⁸ It identified problems not unique to the family court but prevalent there, in that SRLs ‘do not understand the processes involved in undertaking legal action and appearing in a court’, and made suggestions similar to those in previous reports that any proposed reforms should involve the courts, continuing to develop plain language forms and guides, and reviewing case management practices.⁶⁹

The report recommended that the government develop a ‘more systematic approach for allocating funding’ to LACs, according to models ‘which reflect the relative costs of service provision and indicators of need’.⁷⁰ More significantly, it identified a ‘justice gap’ of people who cannot afford to take private legal action but are not receiving legal assistance due to the resourcing constraints faced by legal assistance providers. The report recommended that Government funding ‘be increased by around \$200 million, in particular for civil matters in an attempt to prevent legal problems from escalating, reducing costs to the justice system and the community’.⁷¹ This is an important recommendation in that it confirmed commentary which suggested there was still chronic underfunding for legal assistance services and unmet needs.⁷² The Productivity Commission’s report built on this recommendation to look to duty lawyer schemes to fill the needs of those who were ineligible for legal aid but could not afford private representation.

⁶⁸ Productivity Commission, above n 3, vol 1, 37.

⁶⁹ Ibid.

⁷⁰ Ibid vol 1, 38, Recommendation [21.5].

⁷¹ Ibid vol 1, 38, Recommendation [21.4].

⁷² Pro bono Australia, ‘Justice Gap Growing—Productivity Commission Report’ (Online News, posted 6 January 2015, <<http://www.probonoaustralia.com.au/news/2015/01/justice-gap-growing-productivity-commission-report#>>>).

The report provided strong arguments against the deep funding cuts in 2013 of \$15 million from the budget of LACs and \$6 million from community legal centres, saying that these cuts would further disadvantage the most vulnerable people in society.⁷³ At that time the Government announced a further reduction in funding to legal aid and community legal centres for the 2017–18 financial year.⁷⁴ This announcement was met with widespread criticism to the extent that the Government reversed its decision.⁷⁵ However, even though \$25.5 million was restored to LACs to be allocated over two years, this did not redress the chronic underfunding prior to the reversal.⁷⁶

Overall, the report's recommendations in relation to increased funding assistance with a focus on family law were greeted with approval as supporting the work of legal assistance services.⁷⁷ In particular, the report recommended that LACs expand existing early intervention activities such as duty lawyer services which identify and remedy legal problems before they escalated, as a

⁷³ Law Council of Australia, 'Chronically Underfunded Legal Aid Commissions Suffer Further Cuts in Federal Budget' (Media Release, 13 May 2014). The Law Council pointed out that 'Legal Aid Commissions have been forced to impose ever more stringent means tests and quotas on the services they provide ... some people who qualify for pensions or benefits do not qualify for legal aid'.

⁷⁴ Naomi Woodley, Lisa Mosley and Anna Henderson, 'States and Territories Unite in Fight against Legal Assistance Funding Cuts', *ABC News*, 7 March 2015), <<http://www.abc.net.au/news/2015-03-07/states-territories-unite-in-fight-against-legal-aid-funding-cuts/6287604>>.

⁷⁵ Latika Bourke, Michaela Whitbourn and Jane Lee, 'Another Barnacle Removed: Abbott Government's Planned Cuts to Legal Aid Services now Reversed,' *The Sydney Morning Herald*, 26 March 2015; Matthew Doran and Louise Yaxley, 'Federal Government backs down on Planned Cuts to Community and Indigenous Legal Aid Centres', *ABC News*, 26 March 2015, <<http://www.abc.net.au/news/2015-03-26/government-reverses-community-and-indigenous-legal-aid-cuts/6350550>>.

⁷⁶ Law Council of Australia above n 73. The Law Council's Access to Justice Spokesperson, Dr David Neal SC, said that an additional \$80 million in funding was required by the commissions, 'not a reduction of \$15 million', and pointed out that until 1997 the Commonwealth contribution to the Commissions' funding was 55% while current funding is 35%.

⁷⁷ Jane Lee, 'Australian Legal Aid Services "need \$200 million more a year"—Productivity Commission', *The Age*, 4 December 2014, citing National Legal Aid spokesman and VicLA Managing Director Bevan Warner: 'This is not a report by legal academics or the sector talking about itself. This is the country's premier economic think-tank saying it makes economic sense and provides fairer access to justice'. Also see Clayton Utz Pro Bono National Practice Group Leader, David Hilliard, 'Clayton Utz welcomes Productivity Commission's Final Report into Access to Justice Arrangements', (Media Release, 3 December 2014). Hilliard expressed pleasure that 'the Productivity Commission has recognised that pro bono work is not a viable solution to addressing the level of unmet legal need in Australia'.

way of reducing demand for grants of aid.⁷⁸ The Productivity Commission preferred the Family Law Duty Lawyer Scheme above other similar services.⁷⁹

The Productivity Commission recognised that although the family courts had done much to improve their service delivery, SRLs needed more direct and personalised forms of assistance. It considered there were ‘good grounds for unbundling legal services’⁸⁰ and outlined in detail the level of service provided by SRS, commenting that this model provided a number of advantages by it offering assistance at all stages of litigation. The Commission noted that the service is funded jointly by the Queensland Government and the Legal Practitioner Interest on Trust Accounts Fund,⁸¹ and presented an appealing funding model which would not have an impact on the demand for services provided by LACs. It would also not require additional government funding.

The Commission referred to a recent evaluation conducted by QPILCH of its SRS, which concluded that it helped divert people from the court system and was appreciated by the majority of people who participated in the survey.⁸² The Commission considered the results of a survey conducted by QPILCH to establish client satisfaction with its services. Of 43 responses, only 5 were ‘dissatisfied’, while 36 ‘agreed’ or ‘strongly agreed’ that they were ‘satisfied’.⁸³ The Commission said it was important to note that QPILCH did not offer

⁷⁸ Productivity Commission, above n 3.

⁷⁹ Ibid vol 1. The Commission compared duty lawyer services with those provided to SRLs by QPILCH Self-Representation Service and JusticeNet, South Australia. While admitting that duty lawyer services are fragmented ‘across of organisations and dispute types’ ([14.5]), the Commission found that the model used by LANSW’s EIU ‘works better’. The recommendation was to expand duty lawyer schemes to provide more extensive and comprehensive assistance, beyond the services provided on the day a matter was in court. (520–525).

⁸⁰ Ibid vol 1, 448. QPILCH is an independent, not-for-profit Incorporated Association which operates with the assistance of law students and volunteer lawyers from private law firms which financially support the Association. The Association also receives funding from the Commonwealth Government for matters in the Federal Courts, and through the Legal Practitioner Interest on Trust Account Fund as well as private donations. The SRS provides free legal advice and assistance in civil matters to eligible applications without legal representation.

⁸¹ Ibid vol 1, 449.

⁸² Cate Banks, ‘Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane’ (Cate Banks Consulting), June 2013.

⁸³ Productivity Commission, above n 3, vol 1, 426.

representation in the courts and that 85 per cent of respondents said they would have accepted legal representation if it had been available.⁸⁴

QPILCH's Annual Report identified the main areas of law assisted through the SRS as housing, property disputes and employment. Family law featured as one of the areas for the Association's outreach services.⁸⁵ It is notable that QPILCH's Annual Report of 2014 provided data on other civil matters but did not provide statistics specifically on what percentage of its applications related to family law disputes.⁸⁶

QPILCH's services are provided by volunteer lawyers from the private sector who attend on SRLs and offer assistance at various stages of their litigation, and QPILCH lawyers who assist with drafting simple documentation. It may be that this model offers significant benefits to an SRL who is not in receipt of legal aid and cannot or will not pay a lawyer. However, it is limited by its inability to offer representation in court and its dependence on volunteers. As noted in the most recent Annual Report, 'demand is unwavering and our funding constantly uncertain, [so] staff must divert time from casework to source grants to maintain or extend our services'.⁸⁷

Despite these drawbacks, the QPILCH submission to the Productivity Commission sought to explain the advantages of Community Legal Centres ('CLCs') over LACs in offering more diverse, flexible and less bureaucratic services than LACs, which enabled CLCs to work faster and be more cost-

⁸⁴ Ibid vol 1, 66, citing QPILCH Submission DR247.

⁸⁵ QPILCH *Annual Report 2014–2015* (Queensland Public Interest Law Clearing House, 2015) 5.

⁸⁶ Ibid. It notes that the SRS recorded 727 applications for assistance in 2014–15, including the percentages of people with a disability (27%), people's cultural identity (3%), the reliance on benefits (49%), household incomes (80% less than \$52,000) and the number from regional areas (26%). It records that 95 people discontinued unmeritorious proceedings as a result of advice received from volunteer solicitors. The report provides the number of applications and referrals to pro bono lawyers; it does not provide statistics for the types of matters dealt with under any of the legal issues or courts.

⁸⁷ Ibid. President's Report 5. The President commented on the Association's reliance on fundraising events and referred to the upcoming *Queensland Legal Walk and Red Wine for Justice* event and extended the Association's thanks to the President of the Court of Appeal who launched the *Civil Justice Fund*, expected to build up over time to provide funding for civil law projects.

effective 'because of the use of volunteers and lower wage structures'.⁸⁸ QPILCH said that CLCs were established after funding for non-family civil law was withdrawn from legal aid in the 1990s and focused their efforts on the civil work LACs do not do, such as mental health, refugees, homelessness, administrative law and debt matters in the Magistrates Court.⁸⁹ Noting the trend towards more targeted and holistic models of service delivery, QPILCH said it provided these services in a broad range of areas and that, if CLCs were not adequately funded, LACs could not fill the gap, particularly in regional and remote areas.⁹⁰ This submission may have been an argument that funds were better spent on QPILCH services and intended to draw the Productivity Commission's attention away from recommendations to increase the funding of LACs at the expense of CLCs.⁹¹

The Productivity Commission looked at the QPILCH model when considering what range of services helped target interventions in family law at least cost to the government, comparing the full-cost model of grants of aid, QPILCH's SRS and the duty lawyer Scheme. While acknowledging the benefit of QPILCH assisting people before they filed proceedings and offering assistance 'at all stages of litigation' and with the preparation of documents, in settlement negotiations and preparation for trial, the Productivity Commission pointed out that the duty lawyer services had the additional advantage of providing representation.⁹² It considered that duty lawyer schemes already provided 'unbundled services' by doing discrete tasks for SRLs before their matter reached court, and assisted with completing documents and representing them in court, and so had much to offer. Duty lawyers providing information, advice and representation was seen as reducing the number of SRLs 'who may take up more of the courts' resources'.⁹³ These services were also 'less costly than

⁸⁸ Productivity Commission, above n 3, vol 1, Chapters 20 and 21; see QPILCH's Submission 247.

⁸⁹ Queensland Public Interest Law Clearing House Incorporated, 'Response to the Productivity Commission's Draft Report into *Inquiry into Access to Justice Arrangements* (2013).

⁹⁰ Productivity Commission, above n 3, vol 2, 713 [21.2].

⁹¹ Ibid vol 2, 705 [21.1].

⁹² Ibid vol 2, 706 [21.1].

⁹³ PwC, Economic Value, above n 1, 25.

grants of legal aid' and cost \$205 per session, which is less than the cost of providing in-house representation.⁹⁴

It is noteworthy that Victoria Legal Aid ('VicLA') recently conducted a review of its family law services and considered the QPILCH model, the existing duty lawyer Scheme operated by VicLA, and the EIU duty lawyer service. It recommended that a pilot of the EIU service be undertaken, given that it offered the widest range of services for the most value.⁹⁵ VicLA also proposed that duty lawyer services be provided to assist SRLs in mediation⁹⁶ and specifically in family violence matters.⁹⁷

The Productivity Commission devoted a chapter specifically to SRLs.⁹⁸ The information and data provided relied on previous studies and reports to place self-representation in context. The report particularly commented on the difficulties SRLs had in understanding the complexity of the family law system and the efforts made by the courts to simplify procedures and forms.⁹⁹ Having considered all the options for providing assistance to SRLs suggested in the submissions, the Commission concluded that SRLs appeared to want more than self-help information; they needed to know their legal and non-legal options, to receive realistic advice about possible outcomes, and to be advised of strategies they should adopt to achieve these outcomes. The Commission agreed with QPILCH's submission that 'these services can only come from lawyers'.¹⁰⁰ Their report noted that some submissions considered that 'handbooks and factsheets have their limitations', and noted that either duty lawyers or self-representation services were the most effective and efficient way

⁹⁴ Ibid.

⁹⁵ Victoria Legal Aid, 'Family Law Legal Aid Services Review', Consultation and Options Paper (January 2015), Options for reform, Option 29, 40; Victoria Legal Aid, 'Family Law Legal Aid Services Review', Final Report (Victoria Legal Aid, June 2015). Action eight: 'VLA, in consultation with the Family Law Courts and CLSs, will further investigate the viability of establishing an enhanced duty lawyer service based on the LANSW EIU. This project will include further considering the role of Information and Referral Officer at Court.'

⁹⁶ Victoria Legal Aid, Final Report, above n 95, 24.

⁹⁷ Ibid 19.

⁹⁸ Productivity Commission, above n 3, vol 1, 487–499.

⁹⁹ Ibid vol 1, 504.

¹⁰⁰ Ibid vol 1, 510, 2, citing QPILCH quoting an American Bar Association source.

of assisting SRLs who ‘fall into the “justice gap” between those who can afford private legal representation and those who are ineligible for a grant of legal assistance’.¹⁰¹

The report provided a ‘snapshot’ of duty lawyer schemes,¹⁰² noting that although ‘there is limited evidence on whether duty lawyers help to resolve self-represented matters effectively and efficiently’,¹⁰³ the fact that eligibility tests do not apply to these services¹⁰⁴ meant that they could be accessed by people who would otherwise not be eligible for legal aid. This approach is consistent with the aims embodied in the NPA on legal assistance services for ‘more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion’.¹⁰⁵ It also reflects the views of National Legal Aid:

The assistance by duty lawyers is sometimes more extensive by reason of the person being assisted being ineligible on means, but clearly not having the capacity to engage a private lawyer, or to continue unassisted.¹⁰⁶

The Productivity Commission outlined the benefits of these duty schemes, relying on data from VicLA which showed that in 2012–13, duty lawyers provided 18,205 services for civil law matters, the majority of which were concerned with family violence. Duty lawyers’ attendance on parties involved in parenting disputes represented savings to VicLA of five per cent. This is consistent with the savings identified by the PwC report as additional costs to legal aid in family law matters if duty lawyer services were not performed.¹⁰⁷

¹⁰¹ Ibid vol 1, 514, citing ACT Legal Aid Submission 27, 20.

¹⁰² Ibid vol 1, 515, Table 14.2.

¹⁰³ Ibid vol 1, 515.

¹⁰⁴ Eligibility tests involve a means, matter and merit test under Legal Aid Commission and Commonwealth Guidelines.

¹⁰⁵ COAG, above n 40, 4.

¹⁰⁶ Productivity Commission, above n 3, vol 1, 517, citing National Legal Aid, Submission DR 228, 22.

¹⁰⁷ PwC, Economic Value, above n 1, 10. PwC’s finding was that duty lawyer services represent a 5% efficiency measure for LACs.

The Productivity Commission concluded that ‘both models are successful’ and referred to an early evaluation conducted by the Family Court which had found that the intervention of the duty lawyer resulted in matters either resolving more quickly or, if they progressed through the court, required fewer court appearances.¹⁰⁸ The Commission noted QPILCH’s view that the drawback to duty lawyer services were that they were ‘last minute’,¹⁰⁹ but referred to the submission by LANSW which outlined the benefits of the EIU, pointing out the efficiencies and benefits it provided to the family courts in Parramatta. The LANSW submission explained the extended hours and days the EIU operated, beyond the traditional duty lawyer service of providing assistance to SRLs only on the day their matter was in court. The extended facility, together with the wider range of services provided by the EIU, ‘resulted in a 160 per cent increase in the number of duty matters assisted by LANSW’.¹¹⁰ The Productivity Commission commented that the services provided by EIU represented the extension of duty lawyer schemes which had been recommended by the Senate Legal and Constitutional Affairs References Committee in 2004 and again in its inquiry into access to justice in 2009.¹¹¹

The Commission noted that there had not been an evaluation of duty lawyer schemes and expressed some concern that duty schemes did not serve some SRLs well.¹¹² The Commission cited Macfarlane’s study which said that ‘while many SRLs appreciated the assistance they received from duty counsel ... they [SRLs] also found dissatisfaction’.¹¹³ The Commission report did not go on to explain, as Macfarlane did, that the ‘dissatisfaction’ often came as a result of SRLs saying they did not have enough time with, or access to, duty lawyers.¹¹⁴

¹⁰⁸ Productivity Commission, above n 3, vol 1, 518, 519, citing Family Court of Australia, ‘Self-Represented Litigants: A Challenge—Project Report December 2000–December 2002’ (Family Court of Australia, 2003).

¹⁰⁹ Ibid vol 1, 518, 519, citing QPILCH Submission 58, 26.

¹¹⁰ Ibid vol 1, 518–520, citing LANSW, Submission 68.

¹¹¹ Ibid vol 1, 518 [14.5].

¹¹² Ibid vol 1, 447.

¹¹³ Macfarlane, above n 43, 13.

¹¹⁴ Ibid.

In summing up ‘Where to from here?’ the Productivity Commission seemed to place more weight on the views of participants in the inquiry who considered the extension of duty lawyer schemes more effective than SRS.¹¹⁵ The Commission may have had in mind that opposition to these schemes were by two providers of SRS services.¹¹⁶ The report took a cost-benefit approach by blending the area of economics and the law. There was no clear recognition that not everyone sees the competing values and priorities assessed by the Productivity Commission in the same economic terms.

The comparisons between the SRS and traditional duty lawyer Scheme are helpful. In looking at which model works better, the report noted that the focus of services provided by duty lawyers and SRSs were different and equally valuable; they could co-exist, but there were considerable cost efficiencies for LACs to expand duty lawyer services beyond the ‘role of a mouthpiece, consulted only minutes before a matter is heard’.¹¹⁷

The recommendation that LACs look to extending duty lawyer services which improve the efficient and effective operation of the family courts has particular resonance for the current study. The Productivity Commission noted that the LAC of Tasmania (‘LACT’) was performing very strongly in its delivery of early intervention services such as those provided by duty lawyers.¹¹⁸

In 2015, a review of LACT was conducted¹¹⁹ which noted that from 2012 the number of services provided by the family law duty lawyers continued to grow each year.¹²⁰ The review mentioned that duty lawyer services being provided to

¹¹⁵ Productivity Commission, above n 3, vol 1, 522 citing Allens, Ashurst and Clayton Utz, Submission DR 224, NLA Submission DR 228.

¹¹⁶ Ibid vol 1, 522 citing QPILCH Submission DR 247 and JusticeNet SA, Submission DR 280. The Response by QPILCH to the Commission’s report reflects a concern that any funding provided to extend duty lawyer schemes might be diverted from CLCs offering similar services to SRLs.

¹¹⁷ Ibid vol 1, 518.

¹¹⁸ Ibid vol 1, 168.

¹¹⁹ Peter Evans, *Review of Legal Aid Commission of Tasmania*, Report to the Attorney-General for the State of Tasmania (27 March 2015).

¹²⁰ Ibid 24. In 2011–12, the total services provided were 106; in 2012–13, they were 214, representing a 98% increase; in 2014–15 there were 298, a 39% increase.

so many was 'highly valued by the Commonwealth and the [Legal Aid] Commission',¹²¹ and noted that in other respects, although the range of services provided by LACT had expanded, the statistics showed a decline in their delivery. More particularly, 'the downward trend is in contradistinction to the upward trend in salaries and staff numbers and indicates that LACT is not getting value for money from its staff'.¹²² The review received data from LACT on the respective costs of providing grants for family law services to in-house practitioners as against the private profession and found that '[t]he cost of family law grants in-house is about double the cost of those grants to the private profession'.¹²³ It concluded that 'duty lawyer services may be more efficiently and reliably provided by in-house lawyers [who] provide a level of consistency and continuity that is desirable'.¹²⁴ These comments and findings are consistent with those of a number of reports, reviews and inquiries. In its response to the review, LACT referred to its obligations under the National Partnership Agreement and the extensive research which demonstrated the cost-effectiveness of duty lawyer services as early intervention services. LACT said it would continue to examine the costs and benefits of all the services it provided in recognition of its obligation to deliver fair and equitable outcomes for the greatest number of people, as early, efficiently and expeditiously as possible.¹²⁵

The Productivity Commission's economic analysis was largely concerned with providing the Australian Government with information to assist in developing

¹²¹ Ibid 31. The review notes that LACT *Annual Report 2013–14* (2015) records Tasmania and the Northern Territory as the two poorest jurisdictions in Australia; and that Tasmania has the highest proportion of population dependent upon Commonwealth benefits and the highest unemployment figures in Australia. The review cites the Allen Consulting report (see above n 3) [8.1] which said that the median household income in Tasmania is 26% below the national average and therefore it is likely that a significant number of people receiving duty lawyer services could not afford a lawyer and are the vulnerable people whom Commissions are directed to assist. The review relied on the provision in the Protocol which gave the duty lawyer discretion as to whom they assist, and considered that duty lawyers would not likely assist anyone whom they considered could afford a lawyer, 32.

¹²² Ibid 26.

¹²³ Ibid 37.

¹²⁴ Ibid 41.

¹²⁵ Legal Aid Commission of Tasmania Chairperson and Director's Response to the Review, <http://www.justice.tas.gov.au/__data/assets/pdf_file/0018/318015/Review_of_Legal_Aid_Commission_of_Tasmania_-_Chairperson_and_Director_s_Response_to_the_Review_-_22_May_2015.pdf>.

policies about which services were more efficient and should be expanded and those which should not. The recommendation that duty lawyer Schemes be expanded can be supported by empirical evidence which justifies the allocation of resources.¹²⁶ This was also an important finding in the PwC report commissioned by National Legal Aid prior to the Productivity Commission completing its research.

Despite the multiple policy and practice reforms that have been initiated in relation to family law, the number of people representing themselves in the family courts remains significantly high. Previous studies characterised the Scheme as an early intervention measure. The logic underpinning the Scheme is that it would be useful if the duty lawyer could intervene to assist SRLs *before* matters escalate. The additional benefits of early intervention are that non-legal matters can be diverted from the court and the SRLs who receive assistance can proceed with more knowledge, awareness and confidence that they know what they should do and expect from the court's processes.

The Productivity Commission report noted the cost-effectiveness of duty lawyer services which seek 'to solve problems before they become disputes and resolving disputes quickly before they escalate into entrenched and intractable positions'.¹²⁷ The report cited a finding in the LAW survey that:

In line with new waves of reforms to establish a variety of prevention and early intervention strategies, the concept of access to justice has successively extended beyond access to the formal justice system, to additionally include access to legal information and education, non-court-based dispute resolution and law reform.¹²⁸

It is worth considering how the Scheme operates within the paradigm of an early intervention strategy. The theme of 'early intervention' was put to all participants in the current study to understand, at its most basic, at what stage

¹²⁶ See PwC, Economic Value, above n 1, 10. This report finds that LACs would be required to expend an additional 5% of legal aid budgets if duty lawyer services were not available.

¹²⁷ Productivity Commission, above n 3, vol 1, 145.

¹²⁸ Coumarelos et al 2012, above n 4, 207.

'early' is not early enough, given that the National Protocol envisages that the duty lawyer will usually see an SRL 'in relation to an imminent court event'.¹²⁹ *Black's Law Dictionary* defines 'imminent' as 'near at hand and immediate; impending; on the point of happening'.¹³⁰ This is consistent with duty lawyers being present at the court; however, there can be a wider interpretation: of providing a service towards an impending event.

The Productivity Commission noted the criticisms levelled by SRSs that duty lawyers may offer unbundled legal services, but these tend to be 'last minute' and usually 'at the court door'.¹³¹ This observation may not be completely accurate. While duty lawyers are usually based at the court and may be consulted by SRLs on that day, the services they provide are not necessarily 'last minute'. The National Protocol allows duty lawyers the discretion to see people on more than one occasion. The EIU example demonstrates how it is possible for services to be provided at different stages of an SRL's proceedings and more than once, depending upon the complexity of the matter. Even though duty lawyers have been described as 'emergency room professionals' who deal with people who 'drop in' rather than make an appointment,¹³² they are more than that: they conduct 'triage' to assess a matter and explore a range of options with the SRL to help resolve the matter or divert it to more appropriate services.¹³³ Duty lawyer schemes have also evolved to allow SRLs to make an

¹²⁹ Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme National Protocol ('Protocol')* (2007).

<<http://www.aph.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subld=206418>> [2.2] [2.1].

¹³⁰ *Black's Law Dictionary* (West Publishing Company, 6th ed. 1990) 749–750.

¹³¹ Productivity Commission, above n 3, vol 1, 517.

¹³² Ibid citing QPILCH Submission DR 247; also see Buckley, above n 43.

¹³³ Suzie Forell and Michael Cain, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', Law and Justice Foundation of New South Wales, November 2013.

appointment before their matter is in court,¹³⁴ and some LACs provide services beyond that model.¹³⁵

Although the evaluation of the EIU was conducted in relation to the 'new' service model,¹³⁶ it commented on the benefits of moving away from the traditional Scheme and providing additional services. Research conducted after the introduction of the Scheme suggests that there were perceived shortcomings in the Scheme as well as scope for expansion. Arguably, the strength of the Scheme is that the National Protocol allows the duty lawyer to use discretion in terms of adapting services to fit new paradigms to meet the needs of SRLs.

C The situation in Tasmania prior to the introduction of the Scheme

The LACT had been providing legal advice and assistance clinics at the Commonwealth courts in Hobart and Launceston dealing with family law matters prior to the commencement of the Scheme. These clinics operated every Monday from 1 pm to 2 pm, and were conducted by three Legal Aid practitioners working in the Advice and Community Education ('ACE') section.¹³⁷ This section was staffed by lawyers on a telephone helpline providing general legal advice from 9am to 5pm daily, and face-to-face clinic general advice services at LACT from 10 am until 2.30 pm daily. These services were in high demand.¹³⁸ The Monday clinic provided advice specifically on

¹³⁴ Ibid. Also see Legal Aid Commission of Western Australia duty lawyer service, <<http://www.legalaid.wa.gov.au/LegalAidServices/specialist/familyChildrensServices/Pages/FCS.aspx>>.

¹³⁵ Legal Aid WA, Legal Services Commission of South Australia, and the LANSW EIU operate an expanded duty lawyer model where duty lawyers are based at the family courts, do not carry in-house files, and provide a range of services for SRLs on or around their day in court. VicLA is trialling the EIU model in 2016, see Victoria Legal Aid, 'Family Law Legal Aid Services Review' Final Report (June 2015), Recommendation Eight.

¹³⁶ Forell and Cain, above n 133.

¹³⁷ The researcher worked in ACE prior to being appointed duty lawyer, and was one of three lawyers who conducted the Monday court clinic session.

¹³⁸ Legal Aid Commission of Tasmania, *Annual Report 2013–2014* (LACT 2014) records that there were 20,027 telephone calls to the helpline and 6,637 face-to-face consultations. The ACE section also conducted community legal education sessions attended by 6,223 people.

family law matters. Clients usually had 10 to 15 minutes to explain their issue and receive basic advice. The people who came to the Monday sessions were generally referred by court staff in the registry because they had a matter before the court or were about to file documents in the court. Referrals were also made by lawyers staffing the helpline and clinic, if it was established that the person was not eligible for legal aid.

The timing of the sessions was tightly controlled as the lawyers were required to return to their substantive jobs in ACE at 2.00 pm. If people were not attended to within that timeframe, they were asked to return the next week. There were no guidelines as to how the clinic should be conducted or the type of assistance which could be offered. There was no priority system in place for attendances, with people being dealt with on a 'first come, first served' basis. There was no assessment of urgency or complexity. There was no recording of time taken on each matter. It was left to the lawyer conducting the clinic how many times they saw one person. There were occasions when a lawyer might 'ban' a person for attending the clinic on a regular basis and abusing the process; this was a personal decision and not made on the basis of how many attendances constituted continuing representation.

More importantly, there was no recording of a person's details. This created a problem in that it was not possible to know whether a conflict existed whereby the lawyers were providing advice to a person in clinic who was involved in a matter where LACT represented the other party. The clinic model was based on the clinic advice services offered by the ACE section of LACT. It offered an advantage over the LACT sessions in that there were no time constraints imposed on the service apart from the number of people waiting to receive assistance. The court staff at the family courts often commented to the lawyers conducting the sessions that they encouraged SRLs to attend the clinics as it relieved them of the pressure of having to deal with people who did not understand the difference between legal assistance and legal advice.

Director's Report, 6. The services are provided in Hobart and the north and north-west of the state.

D Introduction of the Scheme in Tasmania

The Scheme commenced operation in Tasmania in March 2005. Its launch was not accompanied by a campaign to make people aware of the existence of the Scheme or what the duty lawyer could do for SRLs. There was a brief mention on the LACT website that there was a family law duty lawyer service, but no elaboration on its functions or availability.

The funding allocation for the duty lawyer positions in Tasmania was for two positions at 0.5 FTE each.¹³⁹ This meant that the researcher in Hobart and duty lawyer in Launceston were expected to provide services two and a half days a week. There was no training provided upon employment, or strategies in place for duty lawyers to understand what they needed to achieve at organisational or practitioner levels. There was no measurement of their performance and, consequently, no performance management vehicle for duty lawyers to reflect upon whether there was a need to improve their practice, whether there were any limitations to the performance of their work, or how to evaluate their work other than by individual and unmediated reflective practice. The researcher and the Launceston duty lawyer developed their practice according to their understanding of the Guidelines in the National Protocol and their own experience.¹⁴⁰ There was no operational manual on how to conduct the service. The researcher and the Launceston duty lawyer both carried in-house files. There was little time for duty lawyers to conduct self-reflection regardless of the lack of performance measures imposed by LACT.

At the commencement of the Scheme, the FCA had one judge who conducted duty lists on a regular basis. The (then) FMC, which had commenced operations in 2000, had one judge presiding in the north and northwest of the state. There was no appointment of a judge to sit in Hobart until October 2008. As a result of the 2006 amendments to the *Family Law Act*, the FCA and FMC combined registries in 2007 and the FCA took on complex family law matters.

¹³⁹ See Introduction, A: Background; also see fn 20.

¹⁴⁰ See Chapter IV: Part I: B.I.C Interview: LDL and Comments: researcher.

The FCA ceased to conduct duty lists and the growing numbers of applications on family law matters were directed to the FMC. The FMC commenced conducting duty lists in Tasmania in 2008.¹⁴¹

Upon their appointment in March 2005, neither the researcher nor the Launceston duty lawyer operated exclusively as duty lawyers but retained carriage of in-house files. The disadvantage of this arrangement was that performing both roles created tensions for the practitioners. There was no performance measure for duty lawyer work, but there was accountability and pressure associated with having clients. As a consequence, clients took priority over duty lawyer work,¹⁴² which could lead to a curtailment of services or time provided to SRLs.¹⁴³

It may be that the services provided by duty lawyers were confined in their nature as a result of time limits. In Tasmania, the researcher and the Launceston duty lawyer were appointed in 2005 continue to work in those positions. They attend court on every duty list day of the FCC; in the north of the state, the duty lawyer also appears in the Divorce list, held on a discrete day. The duty lawyers provide the continuity which was favourably commented upon in the Evans Review of the LACT;¹⁴⁴ however, unlike duty lawyer services in other states which require attendance on set days and hours, early in the life of the Scheme, if there was no demand for their services in court, the LACT duty lawyers returned to their substantive work at Legal Aid.

The researcher had practised in family law and worked as a duty lawyer in the Magistrates Court. She initially followed familiar practices in the criminal jurisdiction. It soon became apparent that the time required becoming familiar

¹⁴¹ This initiative was part of the Australian Government's implementation of the components of the new family law reform package introduced through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Duty lists are held in the FCC on the first Monday and Tuesday of each month. Duty lists are the first listing date of any application in court. They are procedural lists with directions as to how the matter is to proceed. There are, on average in Hobart, 40 to 50 matters in each duty list.

¹⁴² See Chapter IV: Part I: B.I.C Interview: LDL and Comments: researcher.

¹⁴³ Ibid.

¹⁴⁴ Evans, above n 119.

with, and providing competent advice in, a family law dispute far exceeded that which she had experienced in the criminal jurisdiction. The Launceston duty lawyer had not previously worked in Legal Aid on family law matters. Both learned on the job and by experience. They dealt with duty lawyer matters in as simple and efficient a manner as their other duties allowed and did not consider options for changing their practice. In the case of the researcher, at the commencement of this research, she relinquished her in-house practice and only performed the duty lawyer role. This gave her the time to reflect on her work practices. As she became familiar with the studies on SRLs and the initiatives of other duty lawyer services she started to introduce changes to her practice.¹⁴⁵ The Launceston duty lawyer continued to work along the traditional lines of the Scheme because her workload pressures required her to prioritise in-house clients.

Another reason for duty lawyers, at least in Tasmania, operating a traditional practice could have been that, as there was no public launch, brochure or any other publication introducing the Scheme, there was initially little demand for the service. SRLs generally became aware of the Scheme either by seeing a reference to it on LACT's website or, more likely, by being referred by court staff or legal practitioners working on the LACT telephone advice line.¹⁴⁶

One of the concerns for this research was the issue of lack of awareness of the existence of the Scheme. At its introduction, if there were conversations involving LACT, the judiciary, and court at Case Management meetings about the role of the duty lawyer, then the duty lawyers were not made aware of them. The researcher in Hobart and the duty lawyer in Launceston introduced themselves to their respective courts at the commencement of the Scheme and

¹⁴⁵ See Chapter IV: Part II: C: The impact of action research on the study.

¹⁴⁶ Lawyers working on the telephone advice line were part of the Advice and Community Legal Education section ('ACE') of the Commission. This section provided the lawyers who staffed the clinic advice sessions at the family courts each Monday.

started working in the role according to their understanding of what was required.¹⁴⁷

At the beginning there was also little awareness or understanding among the private profession of the Scheme. The duty lawyers did not conduct information sessions to introduce the services, instead assuming that professionals would be aware of government initiatives and reforms and know the services a duty lawyer could provide. However, as demonstrated in the results of the stakeholders' survey in Chapter IV, even after the researcher had made presentations to the profession on her research, working with the Launceston duty lawyer to produce a brochure which was widely distributed — even after the Scheme had operated for 10 years — family law practitioners were still confused as to what the duty lawyer could or could not do.¹⁴⁸

For the LACT duty lawyers, there was care and interest in their duty lawyer role. However, there were no guidelines to assist them in how to balance their duty to their in-house clients while offering an efficient duty lawyer service. Although the National Protocol referred to 'Duty Lawyer Scheme Users Meetings',¹⁴⁹ the LACT duty lawyers were not made aware whether any meetings had been convened and had consequently never attended any. There may have been room to improve the duty lawyer service; however, the duty lawyers had neither the time nor the information network to consider changes to the way they worked. It was not until the researcher commenced this study that she had the opportunity to enquire into the interaction of SRLs and other participants with the Scheme and to consider the research on the broader issues that address access to justice for SRLs.

In summary, It cannot be said that there was one trigger which convinced the government to introduce a national duty lawyer service or any consideration given on how the Scheme should operate. The Scheme was one measure

¹⁴⁷ See Chapter IV: Part I: B.I.C Interview: LDL and Comments: researcher.

¹⁴⁸ See Chapter IV: Part III: D Stakeholders' Surveys.

¹⁴⁹ *Protocol*, above n 129, [9.1] and [9.2].

which could provide a range of services at an early stage of an SRL's proceedings which received favourable comment from both those involved with the initial limited duty lawyer services and in reports about how to better assist SRLs. There had been some success in moving away from the traditional approach, and recent reviews of legal assistance services stressed the economic benefits of expanding duty lawyer services.

E Extended and improved duty lawyer services

In November 2012, the Law and Justice Foundation released a report which examined the role and impact of the LANSW EIU which had been operating since 2011.¹⁵⁰ This report has been mentioned previously to explain how this study benefited from the research on the EIU.¹⁵¹ This section looks at how the EIU delivers the duty lawyer service as an introduction to changes made by the researcher in the Hobart which are discussed in Chapter IV.¹⁵²

The EIU noted that it differed from existing duty lawyer services¹⁵³ by providing the type of more comprehensive or expanded services developed in some family courts in Canada, relying on the 'therapeutic' role of family courts which distinguish them from the conventional function of other courts.¹⁵⁴

The key findings of the report included that the EIU duty service work offered:

¹⁵⁰ The LANSW EIU duty service commenced on 14 March 2011 and was reviewed on 31 March 2012.

¹⁵¹ See Introduction; Section A.

¹⁵² See Chapter IV: Part II: C: The impact of action research on the study.

¹⁵³ Forell and Cain, above n 133 note that the Legal Aid Commission of South Australia, Legal Aid Queensland and VicLA provided duty lawyer services to SRLs on the day their matter was in court.

¹⁵⁴ Don Clairmont and Ian Joyce, *The Summary Advice Counsel Initiative: Assessing its implementation, Impact and Future Directions in Two Nova Scotia Urban Areas*, Report Submitted to Court Services Division, Nova Scotia Department of Justice (July 17, 2006). This study notes that duty counsel systems vary across Canada, both in structure and in services offered, but have one thing in common: 'they provide free, initial legal advice to litigants who would otherwise attend court without advice and representation'. The purpose of the service 'may be analogous to the "triage" system employed in emergency medicine', 18–19; also see Farrow et al, above n 7, 25. Farrow recommends a range of options towards a 'multi-option approach to (providing) legal assistance', which involves an increased number of duty counsel performing a greater range of services for SRLs.

More intensive, time-sensitive representation (1 in 8 clients) ... there was a significant positive impact where EIU lawyers were able to have matters diverted from the court, early in legal processes (13.6% of all matters); and improvements in the quality of outcomes for EIU clients.¹⁵⁵

The key research questions of the EIU evaluation¹⁵⁶ were similar to the research questions raised in this thesis. Of particular interest to the current study are the questions relating to differences between the previous service and the EIU service, and an examination of the range of services provided by the EIU.¹⁵⁷

The Evaluation examined the qualitative information gathered through interviews to conclude that the significant improvement in the EIU's outcomes were a direct result of increasing the number of duty lawyers, extending the time they were available, and providing them with administrative support. The level of resourcing of the EIU 'increased from one to two duty lawyers on duty and from half-day to a full-day presence'; the other difference from the previous Scheme was that the EIU duty lawyers were 'solely dedicated to duty services rather than also running a litigation practice'.¹⁵⁸ Being 'firewalled' from the family law practice and located at the court reduced the potential for conflict, which resulted in the duty lawyers being able to take on more clients.¹⁵⁹ This allowed them the freedom and flexibility to offer a wider range of services 'which appear

¹⁵⁵ Forell and Cain, above n 133.

¹⁵⁶ Question 1. Who is assisted by the EIU duty service? Question 2. What does the EIU duty service do to assist unrepresented litigants? Question 3. Has this assistance made a difference to clients and to the courts? Question 4. How does the EIU duty service differ from the previous duty service? Question 5. What features or activities of the EIU duty service contribute to its outcomes? Question 6. Is the EIU duty service an early intervention strategy?

¹⁵⁷ Forell and Cain, above n 133, 6.

¹⁵⁸ Ibid 31.

¹⁵⁹ Ibid 4. Prior to the establishment of the EIU, duty lawyers were rostered from their positions within the in-house practice, and 'firewalled' by locating them at the court and making the position a discrete one outside the family law practice. This reduced possible conflict of interest which occurred under the previous arrangement if there was a possibility that, when returning to the family practice, they acquired knowledge of a matter they had dealt with as a duty lawyer. One duty lawyer estimated that 'at least 50%, possibly more, just anecdotally' may have been subject to a conflict and therefore not be able to be assisted under the old service'. This comment denotes the number of individuals who may have been the subject of conflict, not the number of cases.

to have contributed to the efficient management and resolution of family law matters at the court'.¹⁶⁰

If the difference between the previous duty lawyer Scheme and the EIU was that additional resources made for better outcomes, this was not an unexpected finding.

The aim of the Evaluation was to quantify the various outcomes from the Scheme in order to justify its continued existence. It used the quantitative data to show the types of matters and the stage of the proceedings at which intervention by the EIU service was recorded, but noted in relation to the previous scheme that 'it was beyond the scope of this project to collect such data and quantify any difference that the EIU duty service may have made'.¹⁶¹ More particularly, the report noted that the data provided for the period before the EIU commenced were not available and therefore it was not possible to say 'whether we are seeing an increase from fewer matters with longer, more intensive intervention (e.g. representation) to more short matters with less intensive assistance (e.g. advice only), or whether there has been an increase across all types of assistance'.¹⁶² As the report's research design of conducting interviews with interested parties¹⁶³ was similar to that used in this study, the findings from the interviews were neither surprising nor unusual, in that with the employment of more staff who are dedicated to the EIU, work longer hours and have access to greater resources, there will indeed be better outcomes for all involved in the family court system.

The report concluded that 'this represented an increase of more than 160 per cent in the volume of duty matters dealt with at the Parramatta Family Law Courts ... in the first year of the EIU duty service compared to the year before it

¹⁶⁰ Ibid 30.

¹⁶¹ Ibid 23.

¹⁶² Ibid 30.

¹⁶³ Ibid 8. The evaluation team interviewed EIU duty lawyers, the Manager of the Unit and support staff, as well as one Judge, two Federal Magistrates, one Registrar, two former Registry Managers, team leaders and filing desk staff.

commenced'.¹⁶⁴ The Evaluation found that many positive attributes and efficiency measures could be achieved by offering SRLs something different from the traditional duty lawyer model. The EIU made a strong case that providing legal advice as early as possible in a family law dispute regardless of whether SRLs had a matter in court, assisting them with documents at any stage of proceedings, representing them in court and referring them to more appropriate services and diverting them from court, were all successful outcomes. The EIU face-to-face services were the types of assistance SRLs needed to improve their chances of a fair outcome and reduce the impact on them and the court system by better preparing them to cope with their family law dispute.

In summary, it is clear from the changes made by some LACs, the recommendations in the reports of the Productivity Commission, PwC and Allen Consulting, that the Scheme needed to evolve to offer enhanced services more tailored to the needs of SRLs. These services required the duty lawyer to look beyond the traditional 'emergency room' approach by offering extended services not bound by the parameters of only seeing SRLs on the day their matter was in court.¹⁶⁵ In this way the Scheme could become part of an integrated legal system which empowers SRLs and benefits the court system.

The reports evaluating and analysing legal assistance services stressed the need for LACs to think of more imaginative ways of delivering existing services while maintaining cost-effectiveness.¹⁶⁶ There are lessons to be learned from the analysis of the economic value of legal aid and the acknowledgement in reports of the benefit of SRLs receiving duty lawyer assistance.¹⁶⁷ The Productivity Commission said that 'in terms of costs, duty lawyer services are "less costly than grants of aid" and, as such, are likely to more than offset the

¹⁶⁴ Ibid iv.

¹⁶⁵ Productivity Commission, above n 3, vol 1.

¹⁶⁶ Allen Consulting, above n 2. This report noted that the duty lawyer services played an important role and would be more effective if there were 'greater local planning and a coordinated approach that made best use of available resources and expertise'.

¹⁶⁷ PwC, Economic Value, above n 1, vi.

cost to governments of providing duty lawyers'.¹⁶⁸ The reports acknowledged that the duty lawyer plays a valuable role in ensuring SRLs secure access to justice while conserving resources.

In June 2015, VicLA released its final report on the review of its family law services. In terms similar to those of the Productivity Commission, it examined models of providing services to SRLs¹⁶⁹ and recommended that VicLA 'further investigate the viability of establishing an enhanced duty lawyer service based on the LANSW EIU'.¹⁷⁰ The VicLA review outlined the differences between the traditional duty lawyer service model and that used by the EIU. VicLA remarked:

[T]here was qualified support for this proposal with concerns that there was potential to fragment service delivery and undermine expertise essential for identifying issues and remedies which is gained through regular casework, by separating early intervention unit lawyers and/or information and referral officers from the broader family law practice.¹⁷¹

With this recommendation in mind, together with those of other reviews and the results of this study, the researcher became mindful of the need to adopt a best practice model for duty lawyer services in Tasmania. One of the issues for consideration was how and when duty lawyer services should be delivered to provide most benefit to SRLs.

A recent report of the Law and Justice Foundation¹⁷² identified strategies that had been adopted to improve the implementation of policies to assist SRLs get access to justice. The report provided an overview of access to justice issues to highlight the kinds of problems experienced by SRLs. It examined assumptions made in relation to early intervention programs designed to address unmet legal needs. It relied on previous research which confirmed that people who have

¹⁶⁸ Productivity Commission, above n 3, vol 2, 760.

¹⁶⁹ VicLA, Final Report above n 95. The review compared the range of services provided by QPILCH SRS, LANSW EIU and its own traditional style of duty lawyer services and recommended the adoption of the EIU model, Recommendation Eight, 14–16.

¹⁷⁰ Ibid Action Eight, 3, 14.

¹⁷¹ Ibid.

¹⁷² Suzie Forell, 'Is Early Intervention Timely?' (2015) *Justice Issues*, Paper 20, (Law and Justice Foundation of NSW), 1-13.

legal problems often have a range of other complex problems, such as health issues (including mental health) and possible involvement in other aspects of the legal system (for example, criminal matters). The report confirmed that the accepted ideal view of 'early' is 'before formal court processes commence'.¹⁷³

The report presented LANSW EIU as a model which worked to clarify ideas about 'when is early',¹⁷⁴ citing an EIU duty lawyer:

I guess it gets back to that triage analysis. I think it's just getting people in quickly ... making sure that we can assist them to get the most positive outcome at the earliest possible stage. I still see us as early intervention, even when we come in at a really late stage, because for that client, it's the earliest intervention that they've had.¹⁷⁵

The comment has some attraction as reflecting the optimal interaction point at which the duty lawyer can assist an SRL. Almost everyone can be helped, regardless of the stage of their dispute or litigation, by being given an understanding of the legal process, information or advice which puts them in a better position to advance their matter.¹⁷⁶

The importance of the Law and Justice Foundation report for this study is that the findings of the current study are confirmed; providing duty lawyer services 'at the door of the court' will not meet the need of the majority of SRLs.¹⁷⁷

The report confirmed that 'legal services need to be connected: working as part of a broader service network in order to [together] provide holistic, targeted, client-centred responses'.¹⁷⁸ It supported duty lawyer services which targeted

¹⁷³ Ibid 5.

¹⁷⁴ Forell and Cain, above n 133.

¹⁷⁵ Ibid 34.

¹⁷⁶ Ibid. The author of the Law and Justice Foundation report, Suzie Forell, also co-wrote the Evaluation of the EIU. It is not surprising, therefore, that the report offers the EIU duty lawyer service as an example of an integrated service designed to assess a person's needs and deal with the complexity of their problems

¹⁷⁷ See Chapter IV Part I: B.I.A Survey of Self-Represented Litigants. The majority of SRLs said they wanted help from the duty lawyer before going to court.

¹⁷⁸ Forell and Cain, above n 133, 75.

their resources ‘by client need and capability, so the assistance provided has the best chance of making a difference’.¹⁷⁹

With this consideration in mind the researcher implemented changes to her own practice in Hobart, presented in Chapter IV, Part II: C as the outcomes of the action research process. It was also the basis upon which recommendations for reform of the Scheme in general are made in the final chapter of this study.

F Conclusion

The recent reports, evaluations and reviews focus on the economic benefits of the efficiency of duty lawyer services delivered at the earliest possible stage which target the needs of SRLs. The reports share a finding that publicly funded agencies need to provide more integrated, holistic services for people who face ‘interrelated legal and non-legal problems’.¹⁸⁰ The Scheme is the early intervention measure which the research has found to be the most cost-effective in delivering services to people who are either ineligible for legal aid or cannot afford to pay a private lawyer. It also provides a valuable contribution to the court system. However, the reports also recognise that duty lawyer services were not easily quantifiable.

The recent reports compare the relative costs and outcomes (or effects) of LACs providing family law services by in-house practitioners with the alternative of the private profession providing the same services, and highlight the value of duty lawyers taking a ‘holistic approach’ as more cost-effective. This finding should encourage LACs to make changes to duty lawyer services which embrace the reality of limited funding and adapt accordingly.

Research shows that lack of access to free legal services is clearly a factor behind the number of people representing themselves in the family courts. It is recognised that unresolved legal problems cause significant social, health and

¹⁷⁹ Ibid.

¹⁸⁰ Coumarelos et al 2012, above n 4, xxiii.

financial costs to people involved in the litigation process.¹⁸¹ People who do not qualify for legal aid or who cannot afford to pay a lawyer can receive assistance from the duty lawyer.

The reports which take an economic perspective in relation to evaluating legal services acknowledge the significant benefits to the community and the court system that the intervention of the duty lawyer can provide. Recommendations to extend the service to allow the duty lawyer to assist SRLs before their matter is in court, and at different stages of the proceedings as matters become more complex, are a recognition that the Scheme is sufficiently flexible to allow the duty lawyer to undertake discrete tasks or provide 'unbundled legal services' which provide better and more comprehensive legal assistance to SRLs, thereby removing barriers to access to justice.¹⁸²

This chapter has reviewed the reports released since the commencement of the Scheme in 2005 which assess and analyse the Scheme against a cost basis. The reports concluded that:

- Duty lawyers help to resolve SRLs matters more quickly and with fewer court appearances;¹⁸³
- The Scheme represents a more cost-effective service approach to delivering services than grants of aid to legal aid in-house staff or outsourcing to the private profession;¹⁸⁴
- There are many elements of duty lawyer services which are already 'unbundled'.¹⁸⁵ The Scheme can be expanded by offering more time and

¹⁸¹ Ibid.

¹⁸² Productivity Commission, above n 3, vol 1.

¹⁸³ Ibid vol 1, Box [14.2] deals with the question, 'Is there a link between self-representation and legal aid funding?' 493. The report cites reports by the Australian Law Reform Commission (1999) which found insufficient empirical evidence to make the connection; Senate Legal and Constitutional Affairs References Committee, *'Inquiry into Legal Aid and Access to Justice'* (Final Report 2004) said that, anecdotally, lack of legal aid was at least one of the major reasons for the increased numbers of SRLs; and the report of Rosemary Hunter, Jeff Giddings and April Chrzanowski, 'Legal Aid and Self-Representation in the Family Court of Australia' (Socio-Legal Research Centre, Griffith University, May 2003) found a strong correlation between decreases in legal aid funding and the rising number of SRLs.

¹⁸⁴ Productivity Commission, above n 3, vol 2, 705.

a greater range of services at different stages in a person's dispute; and¹⁸⁶

- The service can be tailored to provide discrete task assistance before an SRL's matter reaches court (and to divert them from the court system).¹⁸⁷ This aspect ensures that more people benefit from the service and conserves the resources of the courts.

In light of the numerous advantages of an expanded duty lawyer scheme, the reports found a strong rationale for LACs to expand duty lawyer services in their area of operation. The changes implemented in Tasmania are discussed in Chapter IV, Part II: C. The recommendations for further reform of the Scheme are presented in Chapter VI.

¹⁸⁵ Ibid vol 2, 647 citing Law Council of Australia Submission, 82. The FLC said that the “‘unbundled” legal services offered by duty lawyers are a way of conducting business to meet clients’ needs with the resources you have’.

¹⁸⁶ Senate Legal and Constitutional Affairs References Committee, *Inquiry into Legal Aid and Access to Justice* (Final Report 2004). This report recommended the Commonwealth Government fund a ‘new duty lawyer service for self-representing litigants in family law matters’, 68 [4.101]. This recommendation was accepted by the government and the Scheme established in 2005.

¹⁸⁷ Productivity Commission, above n 3, vol 1, see Box [14.2], 493; Forell and Cain, above n 133; Allen Consulting, above n 2, 45.

Chapter Three

Methodology

A Introduction

The research for this study was conducted in Tasmania. It involved collecting data from legal professionals and non-legal persons who had either come into contact with the duty lawyer or would benefit from having contact with the duty lawyer in the context of a family law dispute. The empirical research involved a detailed investigation of how the duty lawyer interacted with SRLs, judges, court staff and family law practitioners in the real world of family law.

This chapter briefly describes the ethics process which was followed to conduct the research. It sets out the research questions and describes and justifies the methodology adopted for gathering, interpreting, analysing and responding to data. It describes and justifies the reasons for choosing a mixed method approach and explains the use of in-depth interviews and surveys as the most valuable and appropriate method to answer the research questions. It presents the research design, philosophies, methodologies and strategies used in the study as well as the scope of the study and the selection of participants.

The chapter also explains the reasons for the three stages of the research process which are reported in Chapter IV.¹ It describes how data were gathered from each participant group at each stage, and the procedure used to analyse the data, and discusses limitations of the research which may have arisen from the design of complex survey instruments and data collection over two distinct

¹ See Chapter IV Part I: B.I.A and B.1.B and B.I.C, results from SRLs and results from the interviews of judges and the duty lawyers; Part II: C: The impact of action research on the study: chronological story of the changes made to the Scheme and the reason why they were made; and Part III: D: Survey of stakeholders.

periods. The chapter sets out how this study satisfies the requirements of reliability and trustworthiness.²

B Ethics approval

Final ethics approval was granted to collect data by interviews and surveys from the Human Research Ethics Committee (Tasmania) Network, Social Sciences Full Committee (HREC) on 3 September 2014.³

Approval was also received from the respective Ethics Research Committees of the Family Court of Australia ('FCA'), and the Ethics Research Sub-Committee of the (then) Federal Magistrates Court ('FMC').⁴

The approval of the courts was obtained following confirmation of acceptance of several conditions.⁵ To provide a higher level of anonymity for the judges participating in the research, the judges' gender, location and the court in which each presided were not included in any commentary or results. A further condition was that a copy of all papers and/or reports resulting from the research be provided to the court.⁶ The FCA offered to send out all documentation, including survey instruments, through the court's internal email.⁷

C Research questions

The four research questions controlled this investigation:

² Andrew K Shenton, 'Strategies for ensuring trustworthiness in qualitative research projects' (2004) 22 *Education for Information* 63, section 3.8.1 on validity/ trustworthiness of data analysis.

³ HREC (Tas) Ethics Approval Reference: H0013028.

⁴ At the time of seeking ethics approval, the court was still named the Federal Magistrates Court (FMC) of Australia. The court changed its name to the Federal Circuit Court of Australia (FCC) in July 2013. This study refers to the court under the name it was known as at the time of the relevant stages of this study.

⁵ Approval granted 16 August 2013.

⁶ This process also applied to the FMC.

⁷ Documentation was sent to judges by email to their Associates. The survey of court staff was sent out through the internal email of the combined registry of the FCA and FCC in Hobart.

1. How does the family law duty lawyer Scheme provide access to justice for SRLs?
2. What is the purpose and nature of the duty lawyer role from the perspective of the key participants?
3. What is the impact of the Scheme on SRLs and other key participants in the family law system?
4. What improvements could be made to the Scheme to better deliver the duty lawyer service?

The research questions were explored through an in-depth mixed method investigation using surveys and interviews. Using an action research approach, after data analysis and critical reflection on the results at different stages of the research, changes were made to the delivery of the duty lawyer service. Employing multiple methods of inquiry to gain different perspectives provided a greater understanding of the experiences of each category of participant with the duty lawyer.

D Research methodology

The research design involved a descriptive and interpretive style.⁸ Interview and survey data were gathered from participants in family law matters to discover *what* they wanted and needed from the Scheme and to understand *how* the Scheme worked.

The study also embraced an action research methodology which allowed an interactive inquiry that balanced the collection of data from the survey and interviews with analysis after each stage of the process. Using reflexive practices allowed changes to be implemented to improve the delivery of the service through the participant researcher. The position of the researcher as a duty lawyer working in the system was influential in choosing this approach.

⁸ John Creswell, *Qualitative Inquiry and Research Design: Choosing among the Five Traditions* (Sage, 1998).

The research method is underpinned by particular ontological and epistemological assumptions. An ontological position was adopted insofar as the research involved exploring what the different participants in the family court system experienced in their day-to-day interaction with the duty lawyer,⁹ to investigate multiple 'realities'¹⁰ of people's interactions with the Scheme, such as those of judges, court staff, legal practitioners and SRLs, in order to develop an insight into the Scheme. An epistemological approach provided an understanding of the Scheme through hearing the views of those who interacted with the duty lawyer to gain information about how the Scheme worked for them. The epistemological assumptions were based on the principles of conducting an empirical study designed, through a process of continual reflexivity, to gain knowledge about a particular group's experiences with the Scheme.¹¹

The approach adopted allowed a detailed and extensive examination, for the first time, of the relationship of SRLs with the professional participants in the family law system in Tasmania through the perspective of the Scheme. It was important that the widest possible range of people who had contact with SRLs presented their views and, in particular, that SRLs had an opportunity to comment on their experiences. These data provided a detailed and original information base which greatly enriched the analysis of the key issues addressed in this thesis.

E Action research

Action research was used to obtain 'information on the attitudes and perspectives of practitioners in the field'.¹² The purpose of action research is to combine the activity of investigation with reflection to come to an understanding

⁹ Irene Vasilachis De Gialdino, 'Ontological and Epistemological Foundations of Qualitative Research' (2009) vol 10 (2) *Forum Qualitative Sozialforschung/Forum: Qualitative Social Research* Article 30, (2009).

¹⁰ Margaret McKerchar, *Design and Conduct of Research in Tax, Law and Accounting* (Thompson Reuters, 2010).

¹¹ De Gialdino, above n 9.

¹² David E Gray, *Doing Research in the Real World* (Sage, 2nd ed. 2009), 30.

of how the results may affect and improve practice.¹³ This method helped the researcher understand the context of her practice, and enabled her to apply lessons learned from the results of the research.¹⁴ This type of research suited the design of working with participants to effect changes in the Scheme which would better deliver the duty lawyer service in Tasmania. It was also intended that any improvements to the Scheme would have relevance to other jurisdictions.

One of the most important aspects of the action research was that the research raised awareness of the Scheme among legal and non-legal services in Tasmania beyond the issues directly involved in the research, and created interest which led to requests for presentations to community and professional bodies.¹⁵

The adoption of action research was considered appropriate as a tool for understanding and participating in the study while, at the same time, improving the experience of those using the Scheme which could thereby influence the outcomes of the research. This approach is part of a reciprocal feedback loop which is the essence of action research.¹⁶ The researcher was in the unique position of working as the duty lawyer in Hobart while conducting the research. The topic of the Scheme in Tasmania was identified as one worthy of study and the researcher then looked at how to embark on a process that would both inform and affect the working of the Scheme. Through the process of conducting interviews and surveys, information about the Scheme was

¹³ Julianne E Meyer, K Gerrish and A Lacey (eds), *The Research Process in Nursing* (Blackwell, 7th ed, 2006); Jean McNiff, 'Action Research, Principles and Practice' in Jean McNiff and Jack Whitehead (eds), *All You Need to Know about Action Research* (Sage, 2006).

¹⁴ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), Ch 38.

¹⁵ See Chapter IV Part II: C: The impact of action research on the study.

¹⁶ Richard Sagor, *Guiding School Improvement with Action Research* (Association for Supervision and Curriculum Development Publications, May 2000) Chapter I: What is Action Research? Sagor states the definition of action research used at the Institute for the Study of Inquiry in Education as 'a disciplined process of inquiry conducted *by* and *for* those taking the action. The primary reason for engaging in action research is to assist the 'actor' in improving and/or refining his or her actions', 3.

exchanged with key participants in the family law system and any issues identified were quickly addressed. After reflections on the results at each stage, changes were made to the Scheme to develop its strengths. It is contended that these changes have not only improved the delivery of the duty lawyer service but have benefited the aims of the research by providing participants with information and opportunities to work with the duty lawyer in new ways, which had a practical effect on the research.

The researcher's work as the duty lawyer in Hobart was a great advantage in that it gave her access to, and credibility with, the relevant 'elites'¹⁷ in Tasmania. One of the most important aspects of the research was that it raised awareness of the Scheme among legal and non-legal services in Tasmania and so had implications beyond the issues directly involved in the research. Moreover, it created an interest in the Scheme which led to requests for the researcher to make presentations to community and professional bodies.

Action research is often referred to as 'practitioner research' which involves the researcher thinking about what they are doing, so it becomes part of critical self-reflective practice which then becomes an enquiry as to how the practice develops through the learning process to improve the research.¹⁸ This aspect of the research design meant that when the researcher found there were elements of the duty lawyer practice needing attention or change, she could make the change and then observe its effect. This was mainly possible because the researcher worked independently and had the confidence and experience to try different approaches to service delivery which did not involve policy changes. However, as indicated in the interview of the duty lawyer in Launceston, there must be significant resource and policy changes if the practice as it evolved in Hobart were to be implemented state-wide.¹⁹ Furthermore, when considering

¹⁷ As defined by Sotirios Sarantakos, *Social Research* (Macmillan, 4th ed. 2012) 187; also see Katie Kerstetter, 'Insider, Outsider, or Somewhere in Between: The Impact of Researchers' Identities on the Community-Based Research Process' (2012) 27(2) *Journal of Rural Social Sciences* 99.

¹⁸ Gray, above n 12, 30.

¹⁹ See Chapter IV Part I: B.I.C: Interview: LDL.

recommendations to improve and enhance the Scheme,²⁰ it is important that any changes are consistent with LACT guidelines, the National Protocol, government policies about implementing early intervention strategies, and the reality of limited legal aid funding.

Action research design allows scope for flexibility. This was particularly relevant as data collection and analysis took place over a two-year period and at different stages. This allowed the researcher time and opportunity to review the lessons learned at the different stages of the research. The design involved the researcher in constant critical reflection to avoid over-involvement and bias, yet provide sufficient data sources to make the claim that the study was trustworthy.²¹

(i) Subjectivity

The researcher's role as a duty lawyer guided her choice of research questions and methodology. The motivation and interest which came from her role meant she took a realistic approach while applying an insider's perspective of the participants and the topic.²² It also meant that it was easier for her to gain access to, and communicate with, key participants in the family law system in Tasmania.²³ All the interviewees were legal professionals. The researcher's shared professional background meant that rapport was quickly established and a relaxed atmosphere created. This enabled the interviewer to work around these issues in a way a questionnaire would not allow, making it an attractive feature of this methodology. This embedded position as an insider allowed her to use her personal contacts with the family courts, Legal Aid and family law practitioners, which benefited the research by providing a better understanding

²⁰ See Chapter VI Conclusions and Recommendations.

²¹ Shenton, above n 2, 63–75.

²² Angie Titchen and Rola Ajjawi, 'Writing Contemporary Ontological and Epistemological Questions about Practice' in Joy Higgs, Nita Cheery, Robert Macklin (eds), *Researching Practice: A Discourse on Qualitative Methodologies* (Sense Publishers, 2010) 45.

²³ See Situated Knowledge at [3.6.2] for further information re 'Insider Doctrine'; Kerstetter, above n 17.

and reporting of each group's culture.²⁴ It also resulted in a greater relational intimacy based on trust and professional courtesy.²⁵ Judges and the Launceston duty lawyer spoke freely, and it was possible to apply a 'shorthand'²⁶ approach to understanding what they were saying because the shared professional outlook established a quick rapport.

Being an 'insider'²⁷ provided a valuable insight into the 'subjective understanding'²⁸ of the key participants and the minds of people who dealt with the Scheme on a regular basis. This was an advantage to the research process because the researcher's subjectivity benefited the analysis of the data: her direct involvement in the topic provided her with insights that other researchers might not have had.

A subjective approach was adopted partly so that the researcher could provide her personal opinion in response to the questions asked of the Launceston duty lawyer.²⁹ However, hers was only one of several responses and observations. It is not claimed that her views hold any more weight or should be given greater significance than any other response, and they do not shape this research.³⁰

²⁴ This relates to all groups who participated in the study. Although there was no interaction with SRLs, the researcher's experience as duty lawyer in Hobart where she comes into regular contact with SRLs, and her work in the Legal Aid Commission informed her knowledge and understanding of this particular group, although she does not claim to be part of it.

²⁵ Ann Bonner and Gerda Tolhurst, 'Insider-Outsider Perspective of Participant Information' (2002) 9 (4) *Nurse Researcher* 7.

²⁶ For example, there was no requirement for the interviewer to engage in long introductions or for the interviewees to give detailed explanations. There was an assumption about the subject matter and shared experience.

²⁷ Lauren J Breen, 'The Researcher 'in the Middle': Negotiating the Insider/Outsider Dichotomy,' (2007) 19 (1) *The Australian Community Psychologist* 163. Breen says that generally, insider-researchers are those who chose to study a group to which they belong; outsider researchers do not belong to the group they study. Also see Kerstetter, above n 17.

²⁸ Irving Seidman, 'Technique isn't Everything, But it is a Lot,' *Interviewing as qualitative research: A Guide for Researchers in Education and the Social Sciences* (Teachers College Press, 3rd ed. 2006).

²⁹ The researcher's contribution to the data is discussed in Chapter IV B Part I: B.1.C Comments: researcher; also see Jaber Gubrium and James Holstein, *Handbook of Interview Research: Context and Method* (Sage, 2001) 329; Jennifer Mason, *Qualitative Researching* (Sage, 2nd ed. 2012) 72 in relation to good interviewing techniques.

³⁰ Robert Krizek, 'Ethnography as the Excavation of Personal Narrative' in Robin Patrick Clair (ed), *Expressions of Ethnography: Novel Approaches to Qualitative Methods* (State University of New York, 2003), 141–151. Krizek says, 'I make no claims as to the "correctness" of my answers, only that they make sense to me. Hopefully, however, my

The researcher acknowledges that she did not come to the research as an objective observer but as one who might share some of the views and experiences of the participants. No claim is made that these shared experiences allowed her to generalise. However, they enabled her to bring to the research a comparative perspective based on her understanding and experience of similar situations, a stance that allowed her to highlight the variety of positions and views put forward by the participants with a richer, and more focused, perspective than if she were an 'outsider'.³¹

Sociologists and qualitative researchers have engaged in extensive debate about the advantages or disadvantages of researchers being 'outsiders' or 'insiders' in relation to the groups they study.³² The 'Insider Doctrine' contends that insider researchers are persons who have a similar caste as the group being researched and, as such, are uniquely positioned to understand the views and experiences of the groups of which they are a part.³³ The advantages of being an insider are that it is easier to get access to the research subjects, quicker to build trust and to be accepted.³⁴ The criticism of this position is that only by being outside the research can one be objective and analytical about the subject matter.³⁵

Some difficulties have been identified by social scientists which may be experienced by an insider when collecting data, especially during interviews, in that the personal relationships and familiarity with the participants may result in

answers will provide some insight for other ethnographers ... to help guide their ethnographic practices and to help them answer their questions', 142.

³¹ Iain Hay, *Qualitative Research Methods in Human Geography* (Oxford University Press, 3rd ed. 2010) 33; Matthew Miles and Michael Huberman, *Qualitative Data Analysis* (Sage 1994) 35.

³² Breen, above n 27; Kerstetter, above n 17.

³³ Kerstetter, above n 17.

³⁴ Deianira Ganga and Sam Scott, 'Cultural "Insiders" and the Issue of Positionality in Qualitative Migration Research: Moving "Across" and Moving "Along" Researcher-Participant Divides' (2006) 7 *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research*, 3.

³⁵ Ibid.

the researcher having difficulty focusing on the interview process.³⁶ This aspect is elaborated in the section dealing with critical reflexivity later in this chapter.

It was acknowledged that the researcher's professional position and familiarity with the subject matter could influence the way she collected and considered the information gathered, making the research vulnerable to questions of validity. The researcher chose to adopt a trustworthiness approach rather than strict scientific validity. Trustworthiness of the data was achieved by the researcher continuing to critically assess her role and remain aware of her lack of objectivity and to take account of it throughout the research process while maintaining an active role in the collection and interpretation of the data.³⁷

Another problem identified by commentators about being an insider is that an interviewee might not be as forthcoming if they consider that the researcher already knows the answers and it is not necessary to elaborate on simple responses.³⁸ There were, in fact, many occasions when an interviewee commented 'as you know', but they continued to relate their personal experiences in a more expansive manner *precisely because* they assumed a deeper understanding on the part of the researcher. Far from being a disadvantage, this approach actually sped up the interview process and provided a deeper level of response as the interviewee felt enabled to go into greater detail.

Being an 'insider' also made it easier to relate to the participant interviewees' circumstances and experiences based on the researcher's own experience and knowledge, and to show sensitivity to the interviewees' needs and rights in accordance with an ethical position and professional and moral practice. This

³⁶ Ibid. See section F: 3.3: Critical Reflexivity.

³⁷ Mason, above n 29, 72.

³⁸ Graham Mytton, *Handbook on Radio and Television Audience Research*, 1999 BBC World Service Training Trust, UNICEF, UNESCO (joint publication) 128.

helped the flow of the interviews and formed what Mason calls 'conversation with purpose';³⁹ it led to a rich data set.

Recent research has attempted to move beyond a strict outsider/insider dichotomy to emphasise the relative nature of researchers' identities, depending on the specific research context.⁴⁰ The researcher was cognisant of the need to separate her personal experiences from those of the research participants in order to deflect criticism of potential bias. A research diary was used to help clarify thoughts, log events and examine feelings after the interviews.⁴¹ The research diary page dealing with each interview contained a heading, 'objectivity', as a reminder to the interviewer and an opportunity for reflection.⁴²

The researcher was aware that being a person working as a lawyer inside the court system might also be a disadvantage in that participants might tell her what they believed she wanted to hear, based on an assumption that all professionals in the family court system share the same fixed reality and opinions. This phenomenon is referred to as 'intersubjective understanding',⁴³ or situated knowledge.

(ii) Situated knowledge

In this study, the researcher's specific familiarity with and practical understanding of family law and the environment of the court provided a rich picture of the subject matter.⁴⁴ To address issues of objectivity, interviewees

³⁹ Ibid, 128.

⁴⁰ Kerstetter, above n 17.

⁴¹ Kathryn A Clarke, 'Uses of a Research Diary: Learning Reflectively, Developing Understanding and Establishing Transparency' (2009) 17(1) *Nurse Researcher* 68. For further discussion on the use of the research diary, see Chapter III: F: 3.3 Critical Reflexivity.

⁴² Hy Mariampolski, *Qualitative Market Research* (Sage, 2001). Mariampolski recommends using reminders to help assist recognition of subjectivism and remind the researcher not to influence the interviewees, <<http://doi.org/10.4135/9781412985529>>.

⁴³ Immy Holloway (ed), *Qualitative Research in Healthcare* (McGraw-Hill, 2005).

⁴⁴ Donna Haraway, 'Situated Knowledge: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 (3) *Feminist Studies* 575. The term 'situated knowledge' was coined in relation to feminist approaches to the study of science. This study does not adopt the feminist approach but uses the term to explain the reality of the researcher's position in the field.

were forwarded the questions with the letter inviting participation, the information sheet and the consent form, in advance of the interview.⁴⁵ It was hoped that this would provide an opportunity for the interviewees to reflect on their responses. The interviews with each participant took over an hour at a place nominated by the interviewee.⁴⁶ This ensured that the interviewee was not rushed and was comfortable. It also allowed time for the interview to be more of a conversation and the interviewer to be more responsive, flexible, probing and imaginative, and follow up topics raised by the interviewee.⁴⁷

F Implementation of research design: grounded theory

This study's use of grounded theory relied on research which supports the mixed method approach, which is 'more faithful to the social world than the quantitative one and acknowledges that individual human experiences are important'.⁴⁸ The grounded theory method used in this study follows Corbin and Strauss's approach that qualitative analysis 'should be relaxed and flexible, and driven by insight gained through interaction with data rather than being overly structured and based only on procedures'.⁴⁹ The method also provided the researcher with an understanding of the working of the Scheme by constantly comparing quantitative data from the surveys and qualitative data from interviews and comments from the stakeholders, as well as the researcher's own comments recorded in the research diary,⁵⁰ to identify themes and develop theories for changing the way the duty lawyer service was delivered.

⁴⁵ See Appendix B for the document pack to Judges and Appendix C for that to duty lawyers.

⁴⁶ Interviews were conducted in the Judges' chambers and at the office of the Legal Aid Commission of Tasmania in Launceston.

⁴⁷ Mytton, above n 38, 128; Carolyn Boyce and Palena Naele, *Conducting In-Depth Interviews: A Guide for Designing and Conducting In Depth Interviews for Evaluation Input* (Pathfinder International, May 2006).

⁴⁸ Diane Walker and Florence Myrick, *Grounded Theory: An Exploration of Process and Procedure* (Sage, 2006); Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research Techniques and Procedures for Developing Grounded Theory* (Sage, 1998).

⁴⁹ Juliet Corbin and Anselm Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd online ed, Sage, 2008), 12.

⁵⁰ See Chapter III: F: 3.3 Critical Reflexivity for further discussion on the use of the research diary.

The researcher adopted an interpretive paradigm⁵¹ which was 'to describe, to compare and to attribute causality'⁵² and engage in 'discovery arising from active participatory research'.⁵³ This approach was founded on the premise that it was worthwhile to gather information from a diverse range of people affected by the Scheme, based on their subjective understanding of it. The purpose was to learn about the Scheme's effectiveness and processes by gathering information from a small, select sample of participants in Tasmania who were directly involved with the duty lawyer. This has been described as 'purposeful sampling'.⁵⁴

Information from the interviews and surveys was used to answer research questions and gain meaning and understanding of each participant group's perspectives and experiences of the Scheme.⁵⁵ Adopting the grounded theory of research⁵⁶ meant that data obtained from the very first interview was analysed and, through the practice of critical reflexivity and experience, adapted (as appropriate) for the next interview or stage of the research. The use of the research diary also allowed for verification of the hypotheses by constantly comparing the data from different interviewees. This approach has been recognised as a 'cyclical design' where 'constant comparisons' continue to be

⁵¹ Egon Guba and Yvonna Lincoln, 'Competing paradigms in qualitative research' in N K Denzin and Y S Lincoln (eds), *The Handbook of Qualitative Research* (Sage, 2000) 105; Yvonne Lincoln and Egon Guba, *Naturalistic Inquiry* (Sage, 1985); Deborah Cohen and Benjamin Crabtree, 'The Qualitative Research Guidelines Project' citing Lincoln and Guba: on the criteria for establishing trustworthiness of a research study: Credibility, transferability, dependability and confirmability, <http://www.qualres.org/HomeThic-3697.html>.

⁵² Joseph Maxwell, *Qualitative Research Design: An Interactive Approach* (Sage, 1998) 317.

⁵³ Norman K Denzin, *Interpretive Biography* (Sage, 1989). The researcher did not use the participatory research method in the current study as the primary aim was to change practices rather than to engage the stakeholders as 'collaborators' or 'participants'. The stakeholders were not research partners and had no say in the research process; see Tina Cook, 'Where Participatory Approaches Meet Pragmatism in Funded (Health) Research: The Challenge of Finding Meaningful Spaces' (2012) 13(1) *Forum: Qualitative Social Research*, Art. 18.

⁵⁴ Michael Patton, *Qualitative Research and Evaluation Methods* (Sage, 1990) 169.

⁵⁵ Gray, above n 12. Gray describes action research as 'a process of combining theory and research to solve practical problems', 34; Wilfred Carr and Stephen Kemmis, *Becoming Critical: Education, Knowledge and Action Research* (Deakin University Press, 1986) 8.

⁵⁶ Barney Glasser and Anselm I Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine, 1967) refer to this method as 'the discovery of theory from data—which we call *grounded theory* ... provides us with relevant predictions, explanations, interpretations and applications', 1.

made 'until nothing new is added, nothing more is rejected, and the theory or conclusion has crystallised'.⁵⁷ The grounded theory was also useful in relation to the survey instruments, which were initially designed as separate surveys for each category of participant. After testing on volunteer participants and receiving feedback, revisions were made, culminating with one survey for SRLs and another comprehensive, clearer and targeted stakeholder survey.⁵⁸

The grounded theory method also allowed the researcher to identify themes, categories and codes during the course of the study. This was particularly important given that the research was conducted in three stages.⁵⁹ Data at the final stage in September 2015 allowed the results of the initial data analysis to be documented and searched again for themes that appeared in the data.

3.1 Empirical data collection

Data collection and analysis occurred over a period of two years, in three stages. The first stage commenced with a survey of SRLs and interviews with judges and the Launceston duty lawyer in mid- to late 2013.⁶⁰ Analysis occurred in early 2014. The study was suspended for nine months in 2014 to allow the researcher to pursue teaching opportunities at the University of Tasmania. The second stage of the study occurred late 2014 to mid-2015, when the researcher implemented changes to the delivery of the duty lawyer service based on results so far.⁶¹ This stage is reported in Chapter IV Part II: C as results from the action research. The third stage occurred in August 2015 when the survey

⁵⁷ Mytton, above n 38, 128; Boyce and Naele, above n 47.

⁵⁸ The responses from the volunteer participants did not form part of the data. The stakeholders were court staff of the combined registry of the FCA and FCC in Hobart and Launceston and family lawyers who were members of the Family Law Practitioners Association of Tasmania (FLPAT). See Appendix D for the stakeholder survey instrument.

⁵⁹ See Chapter III: F: 3.1 below dealing with the collection of the empirical data.

⁶⁰ See Chapter IV: Part I: B.I.A: Results from survey of SRLs.

⁶¹ See Chapter IV: Part II: C: The impact of action research on the study.

of court staff and family law practitioners (stakeholders) was undertaken. The reporting of the data is contained in Chapter IV Part III: D.⁶²

Semi-structured interviews were conducted with three judges of the FCA and FCC who preside in Hobart and Launceston, and the duty lawyer working with LACT based in Launceston. The researcher provided her own views as the duty lawyer working in Hobart, which formed a separate data set that was coded and included as responses from duty lawyers.

Face-to-face surveys of SRLs were administered using a hard copy survey instrument during the daily clinic sessions provided by legal practitioners working in the ACE section of LACT. Surveys were also administered at the evening advice sessions provided by volunteer solicitors for the Hobart Community Legal Service ('HCLS'). The survey of SRLs was conducted from 13 May to 28 June 2013.⁶³

An online survey designed through SurveyMonkey was used to collect data from court staff of the combined registry of the FCA and FCC in Hobart and Launceston, and legal practitioners who were members of the Family Law Practitioners Association of Tasmania ('FLPAT'). These participants are referred to as 'stakeholders'. The survey period was from 3 to 17 August 2015. The results of the stakeholder survey are reported in Part III: D of Chapter IV.

It was considered that the scope of the study was reasonable and manageable within the researcher's budget and resources. The jurisdiction chosen was of sufficient size and diversity to be representative, while also allowing the study to be practicable. All participants were either involved in the family law system by virtue of their professional role (judges and legal practitioners), employment (court staff), or appearing as an SRL.

⁶² See Chapter IV: Part I: B.I.A: Results from survey of SRLs, B.I.B: Results from the interviews of judges and B.I.C: Results from survey of and duty lawyers; Part II: C: The impact of action research on the study and Part III: D: Survey of stakeholders.

⁶³ See Appendix A for the document pack for SRLs which includes the information sheet and survey questions for SRLs and the Guidelines for the legal practitioners conducting the survey.

3.1.1 Surveys

The surveys enabled the gathering of a range of opinions and comments from a great number of participants state-wide. It was a more efficient and cost-effective data gathering tool than interviews. Research has shown that small-scale surveys directed at a 'targeted audience' are a valid and meaningful way of gathering data.⁶⁴ While the data obtained through surveys cannot be said to offer universal 'truth', a significant response rate from all participants⁶⁵ supports the claim that the results represent the common perspective.

Surveys have been widely used in previous research into the impact of SRLs in the family courts.⁶⁶ This study used a hard copy survey for SRLs in consideration of the difficulties of reaching this category of participant in any other way, and avoided the random nature of an online survey. It ensured that the SRLs who completed the survey were the target population and that everyone who participated in the survey would obtain some benefit. Those who had not been aware of the Scheme were introduced to a service which could help them. Those who had been helped by the duty lawyer could provide feedback, whether positive or negative, on a topic which they were interested in. Moreover, they, or others in similar positions, would benefit from any improvements in the Scheme deriving from the research.

⁶⁴ Lesley Andres, *Designing and Doing Survey Research* (Sage, 2012) 208.

⁶⁵ Earl Babbie, *The Practice of Social Research* (Wadsworth Centage Learning, 12th ed. 2010) 273. Babbie notes that a review of published social research literature suggests that a response rate of 50% is considered adequate for analysis and reporting.

⁶⁶ John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000); Rosemary Hunter, Jeff Giddings and April Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia* (Griffith University, May 2003); Family Court of Australia, *Self-represented litigants: A challenge—Project Report December 2000–December 2002* (Family Court of Australia, 2003); Jeff Giddings, Blake McKimmie, Cate Banks and Tamara Butler, 'Evaluation of Queensland Public Interest Law Clearing House Self-Representation Service', (2014) *Self-represented Litigants*, Paper 3 <<http://www.civiljusticee.info/srl/3>>; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013); Melanie Dye, 'An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court' (Federal Magistrates Court of Australia, October 2004).

(a) Survey of SRLs: 13 May–28 June 2013

SRLs are a group about whom it is difficult to obtain data⁶⁷ and, even more, from whom to gather data.⁶⁸ Various ways of gathering information from SRLs were considered. Conducting interviews would have provided a wealth of data,⁶⁹ but the requirements of the Human Research Ethics Committee Tasmania ('HREC') made this impractical. Advertising for participants was rejected as it might have introduced a sampling bias and undermine the reliability of the study; the group of SRLs motivated to self-select are likely to have strong opinions and could unbalance the study if their perspectives are disproportionately represented.⁷⁰

Through her experience, and relying on previous studies, the researcher was aware that SRLs are unlikely to respond to advertisements in newspapers or to notice a poster asking them to complete a survey, either in legal advice centres or in the foyer of the court.⁷¹ There is no motivation for people to go out of their way to complete a survey.⁷² Likewise, if they were provided with a hard copy to take away, it was doubtful that they would return it.

⁶⁷ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Literature Review*, (Australian Centre for Court and Justice System Innovation, Monash University 24 May 2012); also see Dye, above n 66. Dye comments on the difficulties of attracting SRL participants to complete surveys. Dye administered surveys through Community Legal Centres which provided advice sessions to SRLs.

⁶⁸ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Gathering Useful Information' (Final Report, Australian Centre for Justice Innovation, Monash University, 28 June 2012).

⁶⁹ Bridgette Toy-Cronin, *Keeping up Appearances: Accessing New Zealand's Civil Courts Without a Lawyer* (PhD Thesis, University of Otago, Dunedin, 2015). Toy-Cronin comments on the difficulty of recruiting Litigants in Person for her study using posters and brochures and newspaper articles; she got most participants through a social media site.

⁷⁰ Corinna Cortes, Mehryar Mohri, Michael Riley and Afshin Rostamizadeh, 'Sample Selection Bias Correction Theory', (2008) *Algorithmic Learning Theory* 38, ('Cortes et al'); also see Toy-Cronin, above n 69. Toy-Cronin noted a limitation of the data and that 'LiP self-selection for participation may ... have introduced some bias. [It is possible] that the sample is skewed towards LiPs who had a negative experience of the court system' and 'most LiPs did have some form of complaint about the system'. To offset this negative potential she 'paid particular attention in the analysis to comments made by lawyers, judges and court staff that commented positively on aspects of LiPs' interactions with the courts', 65.

⁷¹ Dye, above n 66; Vanessa Torres van Grinsven, Irena Bolko and Mojca Bavdaz, 'Sources of Motivation in Business Surveys' (Proceedings of the Fourth International Conference on Establishment Surveys, Montreal, 11–14 June 2012).

⁷² Torres van Grinsven, Irena Bolko and Mojca Bavdez, *ibid*.

The researcher's decision to use the clinic sessions of LACT and the Hobart Community Legal Service ('HCLS') was influenced by a project conducted by the FMC to assess the needs of SRLs and improve the court's service delivery, which she noted had difficulty in attracting participation.⁷³ Capitalising on her insider status,⁷⁴ having been employed by LACT and having long-standing connections with the HCLS,⁷⁵ she developed a practical way of collecting data from SRLs.⁷⁶ She provided the practitioners at the clinics with guidelines to administer the survey, an information sheet explaining the research and the way in which the data would be used, the ethics approval for the research and contact details in the event that there were any concerns about the research.⁷⁷ They were also provided with the survey instrument in hard copy.⁷⁸ At the end of the advice session, people who had been representing themselves in the family courts (or intended to do so) were asked if they would participate in the survey. They could complete the survey themselves or, if they wanted help, the legal practitioner could assist.⁷⁹ It was encouraging that every person who identified as a potential candidate, 25 from LACT clinic sessions seeking family law advice and 7 from HCLS,⁸⁰ completed the survey during the six-week

⁷³ Dye, above n 66. The report notes the difficulty in recruiting SRLs and had to resort to hiring two consultants to pose as SRLs and provide comments on their experience. It is argued that this approach was only possible as the project was headed by Chief Justice Pascoe and involved an internal court review of its services. The FMC project asked 22 Community Legal Centres to participate; only four agreed to administer surveys to SRLs over three months. During that time, 60 surveys were completed.

⁷⁴ Kerstetter, above n 17.

⁷⁵ The researcher became an ordinary member of the HCLS in 1996, served two terms as President, continued as an ordinary member and is currently the President of the Board of Management. She commenced as volunteer in 1996 and continues to work as a volunteer solicitor for the evening advice clinics conducted by the HCLS.

⁷⁶ See Dye, above n 66.

⁷⁷ There were no complaints or ethical concerns expressed by any of the participants to the researcher or her supervisors.

⁷⁸ See Appendix A for guidelines to lawyers conducting the survey of SRLs.

⁷⁹ This assistance was put in place in consideration of the difficulties some SRLs may have had in completing the survey, see Australian Bureau of Statistics 1307.6 – Tasmanian State and Regional Indicators, June 2008: Adult Literacy in Tasmania, 2006: The literacy skills of Tasmanians aged 1–74 years were consistently assessed as being below the national average. Less than half (49.3%) of Tasmanians were assessed as having adequate document literacy skills, <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1307.6Feature+Article1Jun+2008#Literacy%20in%20Tasmania>>.

⁸⁰ The difference in response rate may be explained in that LACT clinic sessions are conducted daily whereas HCLS clinics are evening sessions twice per week.

sample time.⁸¹ The survey questions were designed to capture both those SRLs who received the assistance of a duty lawyer and those who did not. The questionnaire did not ask whether they were involved in court proceedings or at what stage of litigation they were currently engaged, in an attempt to access as many SRLs as possible without limiting the sample to those who already had matters in court.

Of the 32 completed questionnaires, two were discarded as a substantial component of the document was missing⁸² and data analysis was undertaken on the remaining 30. The data are reported as 30 participants, 16 who did not receive the help of the duty lawyer and 14 who did. The data were divided into two sets accordingly. Measurement of responses from SRLs was reported as the number out of 14 or 16.⁸³ The results are presented in Chapter IV, Part I: B:1:A.

The data from the SRL surveys were analysed for patterns via Excel. Coding of the data enabled frequencies of responses to be generated, showing trends of responses to questions. It is considered that the response rate of 30 in six weeks compares favourably with the FMC project's responses of 60 in three months. This is arguably a significant result, given the different resources and time available to each study.

It is acknowledged that the group of SRLs who attended the clinic sessions and participated in this study may be more in control of their situation than the SRL category often described as having multiple problems, including disability and mental health issues, who are too lost, confused or disenfranchised to even seek advice.⁸⁴ It was not to be expected that this survey could reach all those vulnerable people who took no action to resolve their family law problems. It

⁸¹ The survey was conducted from 3 to 17 August 2015.

⁸² Survey data from SRLs: 8 and 9 were omitted.

⁸³ Percentages were not given for responses of any cohort of 30 or less than that number.

⁸⁴ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia-Wide Survey: Legal Need in Australia—Access to Justice and Legal Needs' (Law and Justice Foundation of New South Wales, 2012) 7, 12, 20, 25 ('Coumarelos et al 2012').

was hoped, at least, that the participants in the study would read the information sheet and discuss the research with relatives or friends, and that greater awareness of the duty lawyer service would result in more people seeking to use it.

(b) Stakeholder survey: 3–17 August 2015

There was a considerable yet unavoidable delay between the time of designing the stakeholder survey and administering it.⁸⁵ In the initial Ethics Application, individual survey instruments were to be sent to each category of participant. Prior to conducting the survey, one survey was sent to volunteers from the court and another to LACT family law practitioners to test the questions.⁸⁶ This approach was used to provide an opportunity for reflection and revision of the research instruments and the method of data collection. The researcher received useful feedback and recognised flaws in having separate surveys which effectively asked similar questions. She decided to adopt one survey instrument for all stakeholders, as a more efficient way of gathering and analysing data. The modifications to the research process were the subject of an Amended Ethics Application.⁸⁷

An online survey to stakeholders was designed, administered and analysed through SurveyMonkey.⁸⁸ A Participant Information Sheet was attached to the survey. Participants were asked to respond by 17 August 2015 and were advised that after the first week, in the event that the response rate was low, they would receive a reminder email. The format was, in the main, a multi-point Likert scale questionnaire design of 26 questions. The SurveyMonkey software allowed questions to be asked about the participant's attitudes, beliefs and opinions which would lead to a better understanding of how they interacted with the Scheme. All surveys were voluntary and anonymous, as this was considered likely to elicit honest and accurate answers. Given the large number

⁸⁵ This was mainly due to the revision of the instruments after an amendment of the research design, which required additional ethics approval.

⁸⁶ Duty lawyer, court staff and LACT family law practitioners.

⁸⁷ Submitted 4 August 2014.

⁸⁸ See Appendix D for the document pack to stakeholders.

of comments made in addition to answering the survey questions, it is reasonable to conclude that the participants approached the survey by wanting to make a contribution by adding their view. This aspect significantly added to the qualitative data available for analysis.

The survey was sent to all court staff of the combined registries of the FCA and FCC in Hobart and Launceston through the court's internal email.⁸⁹ There are a total of 22 court staff, 15 in Hobart and seven in Launceston. As only 7 responses were received in the first week, a reminder email was sent. A total of 14 responses were received from court staff at the end of the 2 week period.

The online stakeholder survey was also sent to all 47 active family law practitioners who were members of FLPAT, through the Association's internal email.⁹⁰ At the end of the first week, as only 12 responses had been received, a follow up email was sent to all members. At the end of 2 weeks, 26 FLPAT members had completed the survey (N=26 of 47) with the majority providing significant and useful comments. The response rate represents 55 per cent of total members.

The total population of those who could have responded to the stakeholder survey was 69. There were 38 responses received, resulting in a 55 per cent response rate overall to the stakeholder survey.

(c) Limitations arising from research design and implementation of the survey instruments

During the course of this study, the researcher identified a number of limitations which related to the methodology and the research process. During the

⁸⁹ This arrangement was offered by the Research and Ethics Committee of the FCA and FCC. The Registry Manager, Hobart, was provided with a copy of the letter and facilitated the distribution of the survey.

⁹⁰ The researcher is a member of FLPAT and joined the Executive Committee in August 2015. This arrangement received approval from the Association's Executive Committee, following an approach by the researcher at the Association's Annual Conference in May 2013. Although the survey was not sent out until August 2015, the researcher maintained open communications with the Executive Committee and received renewed consent for the survey to be conducted.

extended time between the first and third stage of data collection, it became apparent that the survey instruments for SRLs and stakeholders could have been better structured and designed. In general, both surveys were too long and presented complex answer options. In particular, the survey instrument for SRLs did not provide clear instructions on how to complete the survey. For example, those SRLs who had not had the assistance of the duty lawyer provided responses to questions directed at those SRLs who had been assisted by the duty lawyer, and vice versa.⁹¹

This complex survey design, together with the lack of clear instructions, may have resulted in participants being confused. This may explain why some SRLs answered questions in both sections. It was also disappointing that despite almost every question asking for further detail, few comments were provided. The instrument also did not give clear enough guidance whether some questions required a single or multiple responses. Some respondents selected all the answer options or wrote 'all the above'. Listing all the services may also have given respondents the impression that the duty lawyer provided full representation. On the other hand, the responses may have indicated that SRLs needed the entire range of services.

In hindsight, it may have been simpler to have had one survey for each set: those who had received assistance from the duty lawyer and those who had not. It would also have been more consistent if the questions posed to SRLs and the other participants were the same. These difficulties with the survey design also made the process of data analysis more difficult, as is reflected in

⁹¹ The survey was in three parts: Questions 1 to 7 inclusive were to be answered by all participants; Question 8 asked if the participant had received the assistance of the duty lawyer. If they had, they were directed to Section A, which required them to answer Questions 9 to 18; if they had not received assistance they were directed to Section B, commencing with Question 19 which asked whether they would have used it. If they answered 'Yes', they were to answer Questions 21 to 25 inclusive. If they answered 'No', they were asked at Question 20 to provide the reason, and at Question 25, how the Scheme could be improved. The SRLs directed to Section A were not directed to Question 25. Only three SRLs in that set made comments which were relevant to this question. The majority of respondents, whether or not they had been assisted by the duty lawyer, replied to Question 18 which asked if the duty lawyer could have done anything to improve the service provided to them.

some of the results where the data show a response rate greater than the number of participants.

It would have been preferable if the researcher had been able to take advantage of her access to SRLs as the duty lawyer to conduct in-depth interviews of SRLs after they had had some experience with the family court system. Interviews would have elicited qualitative data which would have been very useful. However, ethical constraints precluded this method.⁹² Nevertheless, the surveys elicited sufficient and adequate responses to inform the research, and the limitations in the survey designs did not affect the trustworthiness of the results.⁹³

Any disadvantages which surveys may create in that they may lead to unclear data because certain answer options may not be interpreted correctly were overcome by including a broad range of open questions beyond the general 'yes' or 'no' options. All survey instruments underwent significant change as the researcher became more familiar with the use of SurveyMonkey and after pre-testing volunteers in Tasmania. The researcher did not record the identity of the volunteers and it is unknown whether they were involved in the final surveys.

3.1.2 Interviews

The best way to find out about a phenomenon or problem is to seek the opinions of those who have first-hand experience of it and/or work in the day to day reality of a system or program.⁹⁴ The qualitative approach of gathering information from in-depth interviews with judges of the FCA and FCC and duty lawyers was chosen because it is 'particularly good for examining whether or

⁹² The HREC (Tas) Network identified SRLs as vulnerable people who might be suffering stress and anxiety as a result of family breakdown and having to proceed through the courts. Ethics approval was not sought to interview SRLs in consideration that they might confuse the researcher's roles as student and duty lawyer, and feel they would receive some benefit from participating in the research or be discriminated against by not consenting to be interviewed. SRLs who participated in the study did so anonymously through a survey conducted by LACT and HCLS legal practitioners.

⁹³ See Chapter III: G (i) Trustworthiness of the results.

⁹⁴ Creswell, above n 8.

not a particular social phenomenon exists and if so, the nature of the phenomenon'.⁹⁵ The data obtained from these interviews revealed the personal reactions, behaviours and motivations of those individuals who most interacted with SRLs and the Scheme. These data could only be collected by conducting interviews with judges and duty lawyers.

In-depth interviews are recognised as a form of qualitative research 'designed to reveal and understand rather than measure and describe' a particular idea, program or situation.⁹⁶ Although family law cases may provide a guide as to judicial views, judges would not normally talk about SRLs in the context of a judgment. It was considered that the judges might be prepared to go beyond what can be reported in a published decision in an open and flowing interview.⁹⁷

Each interviewee received a letter of invitation, an information sheet, consent form and a list of questions in advance of the interview. This enabled the interviewee to provide more thoughtful and considered answers and allowed the researcher to maintain concentration and flexibility during the interview.

The interviews were semi-structured. Each interviewee was asked a set number of standardised questions, together with open questions. This process allowed for the expression of the personal experiences, values and opinions, particularly as rapport was quickly established between the participants and the interviewer due to her insider position.⁹⁸

The interviews conducted were not generalisable because of the small sample sizes and because participants were not randomly selected.⁹⁹ The interviewees chosen did represent an acceptable sampling size of an important group of individuals who came into the closest contact with SRLs and the duty lawyer in all the family courts. The focus of the sample was on quality; it was important to

⁹⁵ Webley, above n 14, Ch 38, 8.

⁹⁶ Mytton, above n 38.

⁹⁷ Ibid.

⁹⁸ Roger D Wimmer and Joseph R Dominick, *Mass Media Research: An Introduction* (Wadsworth, 10th ed, 2013).

⁹⁹ Boyce and Naele, above n 47.

obtain the views of a select group of experienced, interested and involved interviewees. It was considered that the valuable insights provided by the small number of these subjects was adequate for this project.¹⁰⁰

Commentators on how many interviews are required in qualitative research note that the answer depends upon the methodological and epistemological perspective.¹⁰¹ Based on the mixed methodology of this study, it is considered that the sample size of interviewees was sufficient from which to draw inferences about the views held by each category of participant.

Although the sample size was affected by the time and resources of the researcher and an understanding of the time constraints on judges and duty lawyers, the interviews took place for over an hour and allowed the discussion of controversial topics, such as difficulties for judges and duty lawyers dealing with obsessive, angry or querulous SRLs.¹⁰² The interview format provided the opportunity for interviewees to explain the assumptions underpinning their response. It was also an appropriate forum to discuss cases of family violence where both parties are self-represented, including providing access to justice while balancing the need to protect vulnerable people from the possibility of being exposed to abuse through cross-examination by an alleged perpetrator. A face-to-face interview mitigated potential barriers to discussing such delicate subjects, allowing the researcher to use empathetic listening, careful phrasing and sympathetic questioning, to make sensitive topics easier to discuss.¹⁰³

(a) Interviews with judges

Participants for the interviews of judges were selected drawing on the researcher's 'insider' position.¹⁰⁴ Initially the researcher approached the three judges and informally invited their participation. Upon receiving their consent but

¹⁰⁰ Sarah Elsie Baker and Rosalind Edwards, *How Many Qualitative Interviews is Enough?* Methodological Review Paper, National Centre for Research Methods (2012).

¹⁰¹ Ibid.

¹⁰² Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants – the Dark Side' (2014) *Access to Justice* Paper 32, <<http://www.civiljustice.info/access/32>>

¹⁰³ Mytton, above n 38, 140.

¹⁰⁴ Titchen and Ajjawi, above n 22; Kerstetter, above n 17.

prior to conducting the interviews, ethical clearance was sought from the respective courts' Ethics and Research Committees. When approval was received, letters of invitation were sent by email to the judicial associates, along with an information sheet, a consent form and a list of indicative questions. Interviews were arranged at a time convenient to the judge, at their chambers. The interviews were conducted from August to November, 2013. In each case, the completed consent form was given to the researcher at the interview.¹⁰⁵ The interviews were recorded on the researcher's iPhone and transcribed in early 2014. Participants were provided with the transcripts for checking; one judge made a minor amendment. This is discussed later in this chapter when reporting data analysis methods.

The sample of judges is small, but includes all the family law judges in Tasmania. The subjects' particular value was in their accumulation of 30 years of service as judges. Their contribution to the process of data collection was not only in terms of their knowledge and experience, but more particularly in recognition of their influence on the change process. From the researcher's perspective, in a small jurisdiction such as Tasmania it was very important to have the judges' assistance in implementing any changes to the delivery of the duty lawyer service. The action research approach allowed the researcher and the judges to work collaboratively to improve aspects of duty lawyer practice. The results of the interviews are reported in Chapter IV, Part I: B.1.B.

(b) Duty lawyers

There are two family law duty lawyers working for LACT, the researcher in Hobart, and one duty lawyer in Launceston who also services the northwest of Tasmania. Each was appointed at the commencement of the Scheme in 2005 and has more than 10 years' experience as a family law duty lawyer.

¹⁰⁵ See Appendix B for the document pack to judges. Reference to the interviews with the judges in Chapter IV Part I: B.I.B is in order of the date of interview: Judge 1 (29 August 2013), Judge 2 (9 September 2013) and Judge 3 (8 November 2013). The date is omitted from subsequent referencing.

It was considered that the views of such experienced duty lawyers would provide rich data to answer the research questions. Information obtained provided a valuable insight into how the Scheme operates in Hobart and in the north of the state. The duty lawyers' responses allowed inferences to be drawn about the working practices and experiences of those working under the Scheme compared with those working in other state or territory LACs.¹⁰⁶

Interview with Launceston duty lawyer

The duty lawyer in Launceston is the researcher's colleague. She was approached informally and, having agreed to participate in the study, was sent a letter of invitation, participant information sheet, consent form and set of questions.¹⁰⁷ The questions were indicative only, so the researcher could retain flexibility and follow openings in conversations, or probe issues where appropriate. An interview was arranged by email and conducted in the Launceston office of LACT on 29 August 2013. The interview was recorded on iPhone and transcribed by the researcher.¹⁰⁸ The Launceston duty lawyer was provided with the transcript but made no changes.

Comments from researcher as the Hobart duty lawyer – research diary

The researcher's reflections on methodology, including the refinement of method, her 'results' based on her responses to the research questions and her comments following the analysis of the results were added during this time through use of the research diary. The results of the interview of the Launceston duty lawyer and the comments of the researcher are reported in Chapter IV, Part I: B:1:C.

¹⁰⁶ See Suzie Forell and Michael Cain, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', Law and Justice Foundation of NSW (2013). This evaluation notes the importance and advantages of having mature, experienced family law practitioners working as duty lawyers.

¹⁰⁷ See Appendix C for Interview pack sent to duty lawyers.

¹⁰⁸ This approach was recommended in Boyce and Naele, above n 47.

3.2 Changes made to the Scheme as a result of action research: January 2013 –June 2015

After discussions with colleagues and other participants interested in the study, and drawing on feedback after presentations to agencies,¹⁰⁹ the researcher felt there were a number of initiatives which could be put in place to raise awareness of the Scheme and better deliver the duty lawyer service.

One of the aims of this study was to identify opportunities to make changes to the Scheme to better deliver the duty lawyer service.¹¹⁰ Following the analysis of the data from the interviews and surveys and her reflection at different stages of the research, the researcher drew preliminary conclusions about what needed to be changed to provide better service and outcomes for SRLs and other stakeholders in the family law system.

The manual recording of the data from the survey of SRLs and the interviews was completed in early 2014. Manual analysis was chosen as the best method for analysing the data as they were a manageable amount. The data obtained through interviews and surveys were reviewed, coded and interpreted to determine what themes emerged. A list of themes was prepared to correspond with the research questions. The recording identified new themes, and similarities and differences in responses from the participants. The lessons emerging from the research were applied at the next stage of the study, which

¹⁰⁹ Presentations on the Duty Lawyer Scheme were made by the researcher to the Pathways Network (Family Law Relationships Centre) in Tasmania on 26 February 2014 and 23 July 2014; to the National Council of Single Mothers during their annual meeting in Hobart in November 2013; to the Independent Children's Lawyers Conference held in St Marys, Tasmania on 16 May 2014; and to the Annual Conferences of the Family Law Practitioners Association of Tasmania (FLPAT) in 2014 and 2015.

¹¹⁰ Bob Dick, 'You want to do an Action Research Thesis? How to Conduct and Report Action Research (Including a Beginner's Guide to the Literature)' (Resource Paper 17, Interchange 1993) <<http://www.scu.edu.au/schools/gcm/ar/arp/arthesis.html>>.

was to implement changes to the delivery of the service.¹¹¹ The outcomes from this process are described in Chapter IV, Part II: C.

3.3 Critical reflexivity

Given criticism that the researcher's involvement might be perceived to have influenced her choice of interviewees, and that her assumptions governed the way she interpreted their responses, the researcher took a reflexive approach to the research. During interviews she was particularly conscious not to do or say anything which might influence the interviewee. She controlled her body language and tone of voice, and did not offer personal opinions. Interviews were recorded on an iPhone to provide a completely accurate record which, when transcribed, was sent to participants for checking. No notes were taken, but the researcher had a list of the questions to ensure that nothing was overlooked. Not taking notes allowed the researcher to focus on listening and responding to answers and asking follow-up questions. It also had the advantage of allowing eye contact and developing rapport, ensuring that the interviewee was confident they had the researcher's full attention.

The research diary recorded the researcher's responses to the research questions and formed part of the data set coded for duty lawyers. It was also used to reflect on methodology, including the refinement of methods, and to provide a context for reflecting on the research after each interview and at different stages in the research process.¹¹² The researcher recognised that although she could not eliminate herself from the process, she needed to be constantly aware of not inserting her personal opinions into the research

¹¹¹ David Cogan and Teresa Brannick, *Doing Action Research in Your Own Organisation* (Sage, 4th ed, 2014). This sequence of events has been described as cycles of gathering data, analysing, planning action and taking action.

¹¹² The research diary is not a detailed day-to-day recording of what was done throughout the research. The information recorded included ideas that the researcher needed to remember or follow up (a 'to do' list), 'notes to self', questions to participants that might be further explored, reports of observations and personal views and opinions at different stages of the research. It was helpful to note what happened and how the researcher and the participant reacted after each interview, and learned from the process to improve both the instruments and the development of the research.

process unless it was contextually required, to achieve what Hay calls 'research integrity ... which encompasses intellectual honesty, accuracy, fairness and collegiality'.¹¹³ It was understood that the researcher's own notes, memos and diaries were not data, but would need to be maintained as a record of her role in the process.

The researcher concedes that her own experience and knowledge brought an emotional involvement to the research. She also understands that to achieve a critically reflexive stance, she needed to be constantly engaging in self-criticism and ongoing scrutiny of her own thoughts, ideas and emotional involvement in the interviews as part of the research process.¹¹⁴ Spencer says:

A strong reflexivity ... recognises that the ethnographer and his or her language are inevitably part of the phenomenon that is being investigated ... linked into this reflexivity is a sense of responsibility for the consequences of a particular way of representing the words and practices of other people; in this case, a responsibility to recognise complexity and difference, rather than hide them beneath a veil of homogeneity and generalisation.¹¹⁵

The research diary noted the researcher's consciousness of 'the biases, values and experiences'¹¹⁶ she brought to the study. Self-reporting and critically examining one's performance, together with member checking, triangulation and rich description may remove bias in qualitative research.¹¹⁷ It may also sustain a claim for the reliability of the research.¹¹⁸

The researcher acknowledges that unless she adopted a critically reflexive approach, she could not step outside her own profession or separate herself from her own knowledge and experience. She believes that the methodology is

¹¹³ Hay, above n 31; Miles and Huberman, above n 31.

¹¹⁴ J. Spencer, 'Ethnography after Post Modernism' in Paul Atkinson, Amanda Coffey, Sarah Delamont, John Lofland and Lyn Lofland (eds), *Handbook of Ethnography* (Sage, 2001); Ping-Chun Hsiung, 'Teaching Reflexivity in Qualitative Interviewing' (2008) 36 *Teaching Sociology* 211.

¹¹⁵ Spencer, above n 114, 450.

¹¹⁶ Hsiung, above n 114, 216.

¹¹⁷ John Creswell and Diana L. Miller, 'Determining Validity in Qualitative Inquiry' (2000) 39 (3) *Theory Into Practice* 124.

¹¹⁸ Clive Seale, *Qualitative Research* (Sage 1999), <<http://qix.sagepub.com/content/5/4/465>>.

robust enough to allow for the assessment and, if necessary, negation of any bias. The researcher noted that:

[r]eflexivity requires the researcher to be as aware of themselves as the instrument of research. This is a particularly important issue for action researchers who are intimately involved with the subject of the research, the context in which it takes place, and others who may be stakeholders in that context.¹¹⁹

3.4 Sample size

Samples in qualitative research are generally much smaller than those in quantitative studies.¹²⁰ It has been suggested that expertise in the research topic can justify reducing the number of participants in a study,¹²¹ and that studies using a mixed method approach require fewer participants.¹²² It has also been argued that the 'sample size becomes irrelevant as the quality of data is the measurement of its value'.¹²³ The aim of this study was not to make inferences from statistical data but to gain an in-depth understanding of the perspectives of various categories of people involved with the Scheme in Tasmania.

In a study of PhD theses to determine sample size,¹²⁴ it was found that 49 per cent of the studies using the action research and grounded theory method interviewed between 20 and 30 participants¹²⁵ while 37 per cent had a range of 30 to 50 participants.¹²⁶ Guidelines on sample size note that the smallest

¹¹⁹ Marit Borg, Bengt Karlson, Hesook Suzie Kim and Brendan McCormack, 'Opening up for Many Voices in Knowledge Construction' (2012) 13 (1) *Forum: Qualitative Social Research*, Art 1.

¹²⁰ Mark Mason, 'Sample Size and Saturation in PhD Studies Using Qualitative Interviews' (2010) 11 (30) *Forum: Qualitative Social Research*, Art 8, <<http://www.qualitative-research.net/index.php/fqs/article/view/1428/3027#g1>>.

¹²¹ Janice Morse 'Styles of collaboration in qualitative inquiry' (2008) 18 (1) *Qualitative Health Research*, 3–4.

¹²² Mason, above n 120.

¹²³ Greg Guest, Arwen Bunce, and Laura Johnson, 'How many interviews are enough? An Experiment with Data Saturation and Variability' (2006) 18 (1) *Field Methods* 59–82.

¹²⁴ Mason, above n 120.

¹²⁵ Creswell, above n 8; Glasser and Strauss, above n 56.

¹²⁶ Morse, above n 121, 3–4

number of participants in a qualitative study, irrespective of the methodology used, should be 15; but that in any case the sample should not exceed 50.¹²⁷ In this study, the numbers of participants in each category are considered sufficient and appropriate for a mixed method approach engaged in purposeful sampling.¹²⁸

This study does not use statistical sampling and therefore does not make statistical generalisations. It relies instead on established literature¹²⁹ that sample size in qualitative research is more about 'the actual story being told'¹³⁰ than the need to make generalisations about the category of participant. It was also important to consider the issue of saturation: asking a larger number of people may not provide additional data that justifies the time and resources used.¹³¹

The immersion of the researcher in the field, her knowledge of the topic, and her reflective practices, allowed her to uncover a rich source of data from the interviewees beyond mere statistical sampling. The extension of the sampling to stakeholders in the Scheme can sustain a claim that the data obtained are of sufficient quality and quantity to allow trustworthy results to be obtained. This

¹²⁷ Daniel Bertaux, 'From the Life-History Approach to the Transformation of Sociological Practice' in Daniel Bertaux (ed), *Biography and Society: The Life History Approach in the Social Sciences* (Sage, 1981) 29.

¹²⁸ Cynthia K Russell and David M Gregory, 'Evaluation of Qualitative Research Studies' (2003) 6(2) *Evidence-Based Nursing* 36, <<http://ebn.bmj.com/content/6/2/36.full>>.

¹²⁹ Ibid. Also see Yvonne Lincoln and Egon Guba, 'Paradigmatic Controversies, Contradictions, and Emerging Confluences', in N K Denzin and Y S Lincoln (eds), above n 51, 163.

¹³⁰ Valerie Janesick, 'The Choreography of Qualitative Research Design: Minuets, Improvisations, and Crystallization', in N K Denzin and Y S Lincoln (eds) above n 51, 379.

¹³¹ Mason, above n 120. Mason says that grounded theory and action research guidelines indicate that 20–30 people are typically enough to reach saturation. Also see Patricia I Fusch and Laurence R Ness, 'Are We There Yet? Data Saturation in Qualitative Research' *The qualitative Report* 2015 Vol 20 (9) How To Article 1, 1408-1416, <http://tqr.nova.edu/wp-content/uploads/2015/09/fusch1.pdf>; Sarah Elsie Baker and Rosalind Edwards, 'How many qualitative interviews is enough? Expert voices and early career reflections on sampling and cases in qualitative research' *National Centre for Research Methods Review Paper*, 3, citing Harry Wolcott, 'In answer to the question 'How many '(interviews/participants) is enough said 'It depends on your resources, how important the question is to the research and even on how many respondents are enough to satisfy committee members for a dissertation. For many qualitative studies one respondent is all you need – your person of interest. But in general the old rule seems to hold that you keep asking as long as you get different answers'.

study is also considered trustworthy because the sampling covered a wide range of research participants, from SRLs who had dealings with the family court system, to judges and court staff who interacted with SRLs every day, to family law practitioners, some of whom are ICLs working in family law throughout Tasmania. The study represents a comprehensive investigation of the Scheme through its mixed methods and techniques.

Having regard to the literature on SRLs, based on the researcher's knowledge, background and experience in the Tasmanian jurisdiction and also having regard to the practical and resource problems associated with interviewing or surveying stakeholders in mainland jurisdictions, it is considered that the study is appropriately focused on Tasmania.¹³²

3.5 Demographic

It was outside the scope of this study to obtain data and conduct an analysis based on a demographic profile of any one group of participants. The focus was rather on what has been defined as 'the group of individuals [within some population definition] who experience the same event within the same time interval'.¹³³ The study sought to explore the views of a group of people who shared the experience of dealing with SRLs and/or the duty lawyer and did not rely on demographic statistics.

The survey administered to SRLs identified gender and location to provide an understanding of who used the duty lawyer service and whether inferences could be drawn based on this information that could be used to better inform the delivery of the service. The results from 30 SRLs revealed that all SRL participants identified as Tasmanian, with 13 identifying as male and 16 as female. One SRL did not identify gender or location.

¹³² Mason above n 120. Mason says 'more data does not necessarily lead to more information' and confirms that 'because qualitative research is very labour intensive, analysing a large sample can be time consuming and often simply impractical'.

¹³³ Norman Ryder, 'The Cohort as a Concept in the Study of Social Change' (Paper presented at the Annual Meeting of the American Sociological Association, 1959).

Gender and demographic data were not obtained from court staff or family law practitioners to preserve anonymity in a small jurisdiction. This information was not considered an important element of how these participants answered the research questions relating to their views of, and interaction with, the duty lawyer and SRLs in Hobart and Launceston.

G Methods of analysis

(i) Trustworthiness of data

This study adopted the strategy of using ‘trustworthiness’ as a more appropriate term than ‘validity’ as a measure of the quality of research. It has been suggested that ‘the trustworthiness of qualitative research can be established by using four strategies: credibility, transferability, dependability and conformability, and are constructed parallel to the analogous quantitative criteria of internal and external validity, reliability and neutrality’.¹³⁴ In this study the researcher relied on the use of critical reflexivity, through the research diary, member checking and triangulation, to claim trustworthiness. The claim for the reliability of its results is supported by the explanation of the philosophical assumptions and theory behind the study, using mixed methods of data collection (triangulation) and the researcher engaging in critical reflexivity to make clear any biases during the research process.

The techniques employed establish the trustworthiness of the data. The researcher’s status as an ‘insider’ who had spent time in the field of study as well as with the participants establishes ‘prolonged engagement’, one technique for establishing credibility.¹³⁵ The use of multiple data sources and a mixed method approach to data collection and member checking¹³⁶ enhances credibility. Describing the results from each category of participant in sufficient

¹³⁴ Creswell, above n 8, 243.

¹³⁵ Lincoln and Guba, above n 51; Cohen and Crabtree, above n 51 citing Lincoln and Guba: The evaluative criteria for establishing trustworthiness of a research study: credibility; transferability, dependability and confirmability, <<http://www.qualres.org/HomeThic-3697.html>>

¹³⁶ Creswell, above n 8.

detail to provide ‘thick description’¹³⁷ ensures that the conclusions drawn from the results are transferable to other settings and similar groups of people in comparable situations. The researcher’s research diary and critical reflexivity throughout the study are other ‘evaluative criteria’¹³⁸ that establish that the study is credible and the results trustworthy.

(ii) Member checking

Qualitative research needs to be reliable and trustworthy and not a mere recording of narratives.¹³⁹ Unlike quantitative research, where the focus is on consistency of results, qualitative research must demonstrate reliability by showing that the results are consistent with the data presented.¹⁴⁰

The approach which suited the research design and provided trustworthiness was to engage in member checking during and after the interview process.¹⁴¹ The interviews were based on semi-structured questions provided in advance.¹⁴² After the interview, a transcript was provided to each interviewee for review, to ensure the data were reliable. As interviews were conducted at different times,¹⁴³ this allowed for reflection and refinement of the structure and questions in the ensuing interview. This approach, although time consuming, was worth the effort as it provided both guidance and trustworthiness for the research.¹⁴⁴ It was considered that providing complete transcripts rather than summaries avoided the problem of participants forgetting what they had said

¹³⁷ Lincoln and Guba, above n 51; Cohen and Crabtree, above n 51.

¹³⁸ Lincoln and Guba, above n 51; Cohen and Crabtree, above n 51.

¹³⁹ Creswell, above n 8, 243.

¹⁴⁰ Sharan B Merriam, ‘Introduction to Qualitative Research’ in Sharan B Merriam (ed), *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass, 2009).

¹⁴¹ Margarete Sandelowski, ‘Methods of Inquiry’ (1993) 16(2) *Advances in Nursing Science* 1, <<http://www.advancesinnursingscience.com/pt/re/ans/abstract>>.

¹⁴² See Appendix B for document pack to the judges and Appendix C for the duty lawyers.

¹⁴³ Interviews were conducted on 29 August, 9 September and 8 November 2013.

¹⁴⁴ Interviews were transcribed and sent to interviewees by email. There were some lengthy delays in getting responses, involving multiple reminders.

and resiling from their responses, and ensured that correct information was recorded.¹⁴⁵

(iii) Triangulation

To test for trustworthiness, the researcher used triangulation to check whether the different methods led to the same results.¹⁴⁶ The research obtained the views of multiple participants, using different empirical methods in an 'attempt to map out, or explain more fully, the richness and complexity of human behaviour by studying it from more than one standpoint'.¹⁴⁷ Member-checking of information after each interview improved the questions used in subsequent interviews and surveys. It also allowed for the testing of the credibility of the data to find out if they represented one reality of the Scheme which could be transferred across jurisdictions and may therefore be generalised, or if there were multiple realities which were specific to each jurisdiction.¹⁴⁸ Adopting methodological triangulation, involving different and complementary methods for gathering data and asking different participants for their points of view in a variety of ways and in different jurisdictions, provided a richer, more detailed and robust data set.¹⁴⁹

Finally, the methodology provided:

[S]ubstantive validation [which came from] understanding one's own topic, understandings derived from other sources, and the documentation of the process in the written study. Self-reflection contributes to the validation of the work.¹⁵⁰

¹⁴⁵ Lincoln and Guba, above n 51; Cohen and Crabtree, above n 51.

¹⁴⁶ R C Bogdan and S K Biklen, *Qualitative Research in Education: An Introduction to Theory and Methods* (Allyn and Bacon, 2006).

¹⁴⁷ Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Routledge, 2011).

¹⁴⁸ J D Douglas, 'Investigative Social Research', in Lincoln and Guba, above n 51; Cohen and Crabtree, above n 51.

¹⁴⁹ H Altrichter, A Feldman, P Posch, and B Somekh (2008) *Teachers Investigate Their Work: An Introduction to Action Research Across the Professions* (Routledge, 2nd ed, 2008).

¹⁵⁰ Creswell, above n 8.

Maintenance of a research diary following interviews made it possible to get an accurate reflection of the situation, the interviewee and the role of the researcher, in order to record informed perceptions and minimise the chances of error in interpreting the data.

(iv) Data recording and analysis

The hard copy survey responses from SRLs were allocated a separate file, as were those of each group which participated in the surveys. The responses in the survey of stakeholders conducted through SurveyMonkey were stored in the researcher's personal SurveyMonkey account, which is password protected.

A file was created for each judge and duty lawyer interviewed. The file held the transcript of the interview which was directly transferred to the program and de-identified.¹⁵¹ The judges were referred to as 'Judge 1' or 'Judge 2' etc. The duty lawyers were referred to as Launceston Duty Lawyer ('LDL') or the researcher as the Hobart duty lawyer.

A file also held the reflections recorded in the research diary. Each file was labelled by a single code.¹⁵²

This study used a coding system acceptable to grounded theory research of finding data from open-ended questions to identify themes common to all categories of participants.¹⁵³ Themes were identified by looking at phrases or ideas that recurred often and applying the 'constant comparison method' which involved 'searching for similarities and differences by making systematic comparisons'.¹⁵⁴ Recurrent themes from the survey of SRLs were identified using manual coding. These provided the categories of data and allowed

¹⁵¹ It was a requirement of the FCA and FCC Research and Ethics Committees that the gender of each interviewee not be recorded as a condition of granting ethics approval. This was agreed, as the information was not integral to the research.

¹⁵² Coding provides an audit trail for qualitative data analysis; see Marilyn Tallerico, 'Computer Technology for Qualitative Research: Hope and Humbug' (1992) 30 (2) *Journal of Educational Administration* 32, <<http://dx.doi.org/10.1108/09578239210014469>>.

¹⁵³ Corbin and Strauss, above n 49; Denzin and Lincoln above n 51, 41–47.

¹⁵⁴ Gery W Ryan and H Russell Bernard, 'Techniques to Identify Themes' (2003) 15 (1) *Field Methods* 91.

comparisons to be made in such a way as to be able to cross-check information from multiple sources.

A thematic analysis was undertaken to examine the interviews with the three judges and the duty lawyer, each of which was recorded and transcribed.¹⁵⁵ The themes became the categories for analysis and were given colour codes. The themes were not consistent across each participant group as they were not all asked the same questions in the same way. This made analysis more difficult, but there were sufficient common themes to provide a rich understanding of how each participant group thought the Scheme impacted on them, what benefits they thought it provided for SRLs and other key participants in the family law system and, importantly, what improvements could be made to better deliver the duty lawyer service. Each theme was grouped, named and indexed around the research questions. These themes are identified and reported in Chapter IV.

H Conclusion

This chapter has outlined the philosophy behind the research, the methodologies used in the research design, including describing the stages of the research, the participants and scope of the study, the data collection method and the tools used for analysis. It has also explained the multiple methods chosen for data collection, which were the most appropriate for the respective groups and which provided trustworthy data sets about them.

Chapter IV reports the results of the study and Chapter V discusses these results.

¹⁵⁵ Ibid.

Chapter Four

Results

A Introduction

Chapter IV presents the results from the empirical research in tables and figures and comments from the participants. It focuses on the key themes which emerged from the research questions. The chapter also contains the researcher's experiences as part of the action research approach which prompted changes to the Scheme suggested by the results. The results provide the basis for the analysis contained in Chapter V.

This chapter is in 2 parts. Part I presents the quantitative data obtained from the survey of SRLs conducted in mid-2013¹ and the interviews in late 2013 of the three judges and the Launceston duty lawyer.² It also includes the comments from the researcher that were recorded in her research diary.

Part II of the chapter is an action research report which records in chronological order the changes made as a result of the outcomes of the research process. The action research approach involved a series of incremental changes to the Scheme that were implemented as the study progressed.

Part III of the chapter outlines the results from the survey of stakeholders (court staff and family law practitioners) conducted in August 2015.³

The justification for reporting on the action research⁴ prior to engaging in final analysis is that, in action research, it is considered that the rigour of the study can be substantially improved by 'combining collection, interpretation, library

¹ The survey was conducted over a six week period, from 13 May to 28 June 2013.

² The judges were interviewed on 29 August, 9 September and 8 November 2013. The duty lawyer in Launceston was interviewed on 29 August 2013. See Appendix B for the document pack to judges.

³ The stakeholder survey was conducted from 3 to 17 August 2015. See Appendix D for the document pack to stakeholders.

⁴ The changes as a result of the action research process are reported in Chapter IV: Part II: C.

research, and perhaps reporting',⁵ and that 'developing an interpretation right from the start'⁶ gives the researcher more time and more cycles to test the theory thoroughly'.⁷ In this case, the analysis and interpretation of the data from the interviews of judges and duty lawyer and the surveys of SRLs were conducted in early 2014, while the survey of the court staff and family lawyers (stakeholders) did not occur until August 2015. During this period, given that the researcher was embedded in the system, it was impossible not to respond to the findings by seeking to put in place changes to better deliver the duty lawyer service. This approach also suited the reflexive practice whereby ideas are tested to identify problems and assess outcomes. Analysis of the data from the stakeholder survey provided interesting results and feedback on the effect of the changes made and suggested ways to further improve the Scheme. This aspect of the research is discussed in Chapter V.

In this chapter, data are presented for each category of participant under headings that align with the four research questions:

1. How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?
2. What is the purpose and nature of the duty lawyer role from the perspective of the key participants?
3. What is the impact of the Scheme on SRLs and other key participants in the family law system?
4. What improvements could be made to the Scheme to better deliver the duty lawyer service?

B Part 1: Results

This part presents the data collected from SRLs from 13 May to 28 June, 2013.

⁵ Bob Dick, 'You want to do an Action Research Thesis? How to Conduct and Report Action Research (Including A Beginner's Guide to the Literature)' Resource Paper 17 (Interchange, 1993), <<http://www.scu.edu.au/schools/gcm/ar/arp/arthesis.html>>

⁶ Ibid.

⁷ Ibid.

B.1.A Survey of Self-Represented Litigants

(a) Introduction

It was anticipated that the survey responses would identify the services that SRLs needed the Scheme to deliver, what effect self-representation had on them, and any problems they had in accessing information about or using the services offered by the duty lawyer. It was hoped that SRLs would make suggestions to improve the Scheme and thereby improve access to justice for future SRLs with a family law dispute.

Thirty-two responses from SRLs were received, with 14 having had assistance from the duty lawyer and 16 not having had assistance. Survey responses from SRLs 8 and 9 were discarded as they were incomplete.

(b) Background Questions

Questions 4 and 5 were intended to identify which services SRLs use and the nature of their dispute to assist in understanding how to better target the delivery of the duty lawyer service.

Table 1 Court service accessed or attended by SRLs

Option	SRL	N=30
(a) Family Court	4; 10; 12; 17*; 21; 24; 26; 27; 28; 30; 32*	11
(b) Federal Circuit Court (formerly Federal Magistrates Court)⁸	1; 2; 3; 6; 7; 11; 13; 16; 17*; 18; 20; 32*	12
(c) I have not accessed or attended Court	14; 15; 22; 25; 29; 31	6
(d) Family Court website	32*	1
(e) Other, please specify	32*	1
Did not respond	5; 19; 23	3

SRLs marked * accessed or attended more than one court service. Also denotes more than one option chosen by an SRL.

⁸ In April 2013, the Federal Magistrates Court of Australia (FMC) became known as the Federal Circuit Court of Australia (FCC). Although the survey was conducted after the court was renamed, both names were used in the survey to improve identification of the court. <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/publications/corporate-publications/fcc-namechange>.

Table 2 Matter/s in dispute

Option	SRL	N=30
(a) Children	2; 3*; 4*; 7*; 10; 11*; 13; 15; 16; 17*; 20; 22; 26; 29; 30; 32	17
(b) Children and Property	1*; 6; 18; 21; 27; 31	6
(c) Property	1*; 12; 14; 25	4
(d) Child support	3*; 4*; 7*; 19	4
(e) Contravention	4*; 11*; 17*	3
(f) Divorce	24; 28	2
(g) Other, please specify		0
Did not respond	23	1

SRLs marked * indicated more than one dispute

Over a third (N=11 of 30) of SRLs indicated that they accessed the FCA and more than a third (N=12 of 30) had attended the FCC with a majority (N=17 of 30) in relation to a dispute about children and a not insignificant proportion (N=6 of 30) a dispute about both children and property. The high number of SRLs identifying the FCA may reflect a misunderstanding, in that all or most matters may be ‘family court’ disputes but not all disputes are litigated in the FCA.

Smaller proportions had either not attended court or accessed a service (N=6 of 30) or did not indicate which court or service they had accessed (N=3 of 30). One of those participants also failed to respond to the nature of the dispute.⁹ Some SRLs indicated that they had more than one matter in dispute, both children and property.¹⁰

4.1 RQ1: How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?

This study used a broad definition of ‘access to justice’ which looked at the process by which a person involved in the family law system has access to formal and informal systems and structures. It was not limited to access to

⁹ SRL 23.

¹⁰ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey ‘Legal Australia Wide Survey: Legal Need in Australia’ (Law and Justice Foundation of NSW, Sydney, 2012) (‘Coumarelos et al 2012’). This survey notes that people with a ‘disability’ (used to broadly cover both physical and mental illnesses and conceptions) often have multiple legal and social problems, 12, 20, and 25.

lawyers and the courts: it targeted access to the information, advice and assistance which people need to participate effectively in the legal system.¹¹

(i) How does the Scheme operate as an early intervention strategy?

Previous literature has stressed the importance of providing SRLs with access to justice through the early resolution of their matter.¹² Question 22, which asked at what stage SRLs thought they needed duty lawyer assistance, should have been asked of all SRLs. Not one of those who had received assistance responded to this question. The possible reason for this is that the question was located in Section B, which was targeted at those who had not had help from the duty lawyer. Consequently only those SRLs responded, with the majority providing multiple responses.

Table 3 Stage of proceedings that SRL would have benefited most from getting help of duty lawyer

Option	SRL	N=16
(a) Before the court event – as early as possible	6*; 7*; 10; 14; 15*; 16; 18; 20; 22*; 23*; 24*; 25*; 31*; 32*	14
(b) During the court event – to appear for you	6*; 7*; 22*; 23*; 24*; 25*; 30*; 31*; 32*	7
(c) After the court event – to explain the outcome	15*; 22*; 30*; 31*	4
Did not respond	5	1

SRLs marked * indicated more than one stage and more than one response

The responses by SRLs to Question 22 were broadly consistent. The majority (N=14 of 16) wanted assistance before attending court, with almost half (N=7 of 16) also wanting representation during the court event.

One SRL selected all options and wrote ‘all the above’ where there was no provision for comment,¹³ while others selected every answer choice. It is not clear whether those SRLs who provided only one response understood what

¹¹ Louis Schetzer, Joanna Mullins and Roberto Buonamano, ‘Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW’, Background Paper (Law and Justice Foundation of New South Wales, 2002), 65.

¹² Council of Australian Governments, *National Partnership Agreement on Legal Assistance Services* (COAG, 2010) 3; Coumarelos et al 2012, n 10, 207–76, cited in Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, 76 (‘Productivity Commission’); Suzie Forell, ‘Is Early Intervention Timely?’ (2015) *Justice Issues Paper* 20 (Law and Justice Foundation of NSW), 1–13.

¹³ SRL 31.

might be the best time for the duty lawyer to intervene, or wanted the duty lawyer's help throughout the process.

There was a clear preference for access to a duty lawyer at an early stage.

(ii) What awareness is there about the Scheme and the services the duty lawyer provides?

The research question of access to justice was linked to the theme of awareness on the basis that if SRLs knew about the duty lawyer, they would have access to a legal service which could help them to resolve their family law problems. Basic knowledge about legal services has been recognised as an 'essential component of legal capability' and represents one aspect of access to justice.¹⁴

SRLs were asked whether or not they knew that a duty lawyer was available to help them: more than half were not aware.

Table 4 SRL knowledge of duty lawyer availability

Option	SRL	N=30
(a) Yes	4; 11; 12; 13; 17; 19; 26; 27; 32; 30	10
(b) No	1; 2; 3; 5; 6; 7; 10; 15; 16; 18; 20; 21; 23; 24; 25; 28; 31	17
Did not respond	14; 22; 29	3
Total		30

SRLs were also asked, if they had attended court, whether they were offered the assistance of a duty lawyer. Roughly half had and half had not been offered assistance.

¹⁴ Productivity Commission, above n 12, vol 1, 6. The Commission noted that disadvantaged people face a number of barriers in accessing justice, including communication barriers, and a lack of awareness means 'they are both more susceptible to, and less equipped to deal with, legal disputes'.

Table 5 Offered the assistance of a duty lawyer

Option	SRL	N=30
(a) Yes	1; 2; 3; 4; 6; 7;11; 12; 13; 17; 19; 28; 32	13
(b) No	5; 10; 15; 16; 18; 20; 21; 23; 24; 25; 26; 27; 30; 31	14
Did not respond	14; 22; 29	3
Total		30

Questions 7 and 8 were linked to allow for comparison of the results from the survey of stakeholders on the issue of referrals. Responses may also provide information which will help in better targeting the service.

Table 6 Received assistance from a duty lawyer

Option	SRL	N=30
(a) Yes	1; 2; 3; 4; 11; 12; 13; 17; 19; 21; 26; 27; 28; 32	14
(b) No	5; 6; 7; 10; 14; 15; 16; 18; 20; 22; 23; 24; 25; 29; 30; 31	16
Total		30

In response to Question 6, a third (N=10 of 30) of SRLs knew that a duty lawyer was available on the day they attended court or accessed court services, and nearly two thirds (N=17 of 30) said they did not. Three respondents did not answer this question. However, on attending court or accessing court services, in response to Question 7 nearly half (N=14 of 30) of SRLs responded they were offered assistance while just over half (N=16 of 30) were not. Notably, of those who indicated they did not know about the duty lawyer, a small number (N=3 of 30) were offered assistance when they attended court.¹⁵ Three SRLs did not answer either question (See Figure 1 below).

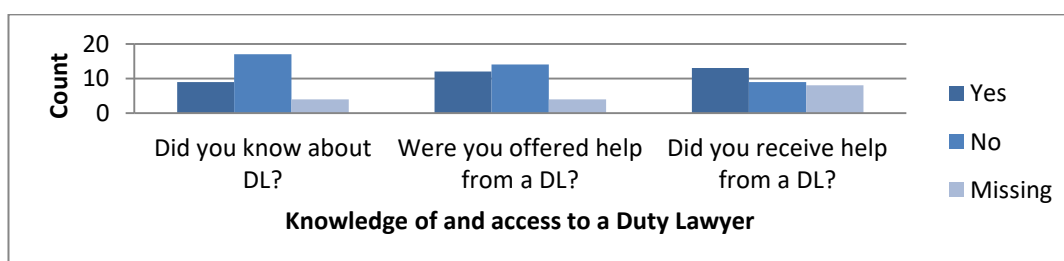


Figure 1 The extent to which SRLs knew of the Family Law Duty Lawyer Scheme, were offered assistance of a duty lawyer, and received help from a duty lawyer while accessing court services.

¹⁵ SRL 21; 26 and 27.

Questions 6 through 8 were designed to elicit data on how the Scheme worked in practice for SRLs. The questions were directed at all respondents with the objective that those SRLs who had not been assisted by the duty lawyer would be made aware that the service exists. The questions also sought to find out who was promoting the Scheme, to identify any gaps in the referral system which could be addressed in future reforms. For consistency, these results were compared to data obtained from the stakeholder survey, which are addressed in Part III of this chapter.

If SRLs said they had received the help of the duty lawyer, they were directed to Section A (Questions 9 through 18). SRLs who had not been assisted by the duty lawyer were directed to Section B (Questions 19 through 25). All participants had the option of answering Question 25, which sought their opinion about how the Scheme could be improved.

SRLs who received assistance were asked to comment on how they found out that a duty lawyer was available to assist them.

Table 7 SRLs' source of knowledge about the duty lawyer

Option	SRL	N=14
(a) Court Staff	2; 4; 13; 17; 26	5
(b) Judge of the Family Court		0
(c) Judge of the Federal Circuit Court (formerly Federal Magistrates Court)	1	1
(d) Lawyer for the other party	3	1
(e) Legal aid staff or lawyer	12; 19; 21; 32	4
(f) Publication / website		0
(g) Other	11; 27; 28	3
Total		14

The referrals to the duty lawyer were mainly from court staff and legal aid staff or a legal aid lawyer. Only one SRL said they were told about the duty lawyer by a judge of the FCC, and one by the other party's lawyer.

The three SRLs who noted 'other' all commented that they had found out about the Scheme via word of mouth.

Table 8 Would SRL have used the duty lawyer service if they had known about it?

Option	SRL	N=16
(a) Yes	7; 10; 14; 16; 18; 20;22; 23; 24; 25; 29; 30	12
(b) No	6; 15	2
Did not respond	5; 31	2
Total		16

The most interesting result to emerge from these data is that three-quarters (N=12 of 16) of SRLs who had not known about the Scheme until they participated in the survey said that they would have used it had they known about it. The promotion of the Scheme to raise awareness, in response to these data, is addressed in Part II of this chapter.

Table 9 If SRL would not have used the duty lawyer service, why not?

Option	SRL	N=16
(a) I distrust all lawyers		
(b) I know my case best		
(c) I want to speak to the judicial officer directly	6	1
(d) I have accessed the court and legal websites/advice lines and think I can conduct my own case		
(e) The court may be more responsive to a self-represented litigant		
(f) It would not have made any difference to the outcome		
(g) to drag things out so the other person spends more money or is forced to settle.		
(h) Other, please specify	15	1
Did not respond	5; 7; 10; 14; 16; 18; 20; 22; 23; 24; 25; 29; 30; 31	14
Total		16

In contrast to three-quarters (N=12 of 16) of respondents reporting that they would have used the duty lawyer service if they had known about it, a small number (N=2 of 16) of SRLs said that they would not have used a duty lawyer even if they had known the Scheme existed. Only one SRL provided a reason, noting a preference for speaking to the judge directly.¹⁶

¹⁶ SRL 6

(iii) What are the benefits of the Scheme?

The survey did not contain a direct question asking SRLs what they perceived as the benefits of the Scheme. However, the responses to Questions 11 and 12 gave some insight as to the benefits perceived by SRLs who received a service from the duty lawyer. Those who received help from a duty lawyer were asked if they thought that their case proceeded more quickly through the court (timeliness) and whether the duty lawyer helped achieve a satisfactory outcome (satisfaction).

Table 10 Effect of having duty lawyer's help on speed of progression through the court

Option	SRL	N=14
(a) Yes	1; 4; 11; 12; 13; 26; 27; 28; 32	9
(b) No	2; 17	2
(c) Don't know	3; 19; 21	3
Total		14

Table 11 Satisfactory outcome?

Option	SRL	N=14
(a) Yes	4; 11; 13; 28	4
(b) No	1; 2; 17	3
(c) Don't know	3; 12; 19; 21; 26; 27; 32	7
Total		14

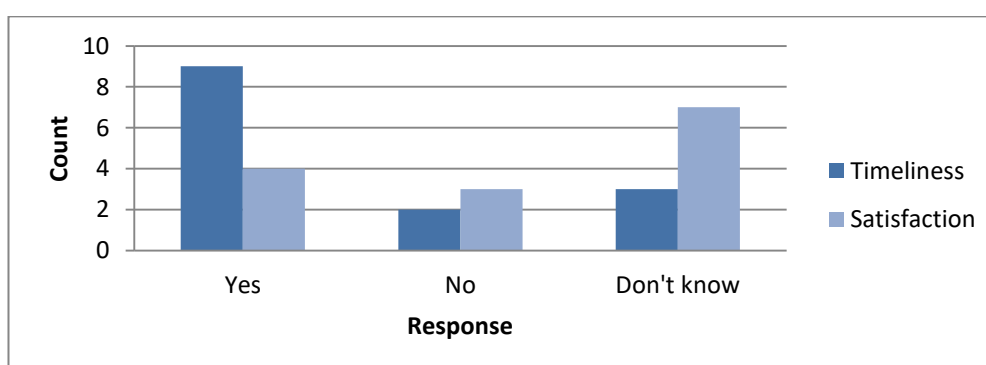


Figure 2 SRL perception of court outcome of their experience through the court system, having received help from a duty lawyer

Almost two-thirds of the respondents to Question 11 (N=9 of 14) thought that their matter proceeded more quickly through the court, while a small number either disagreed (N=2 of 14) or did not know (N=3 of 14).

Half the respondents to Question 12 (N=7 of 14) did not have an opinion. It is possible that this question was unclear in that the word 'outcome' was not defined. The question may have attracted a higher response rate if it had asked the level of satisfaction of SRLs who dealt with the duty lawyer. More SRLs (N=4 of 14) were happy with the outcome than were not (N=3 of 14). The different perspectives of three SRLs on these issues are best reflected by the comments below.

One SRL thought they could have benefited if they had received advice about the process:

I would have filed documents at the (right) time rather than later.¹⁷

Another thought they would get a more positive outcome:

Then my problems would be solved.¹⁸

A third thought about the concept in more personal terms:

Certain I would be a lot closer to getting what I want.¹⁹

SRLs were asked to describe how they felt after having seen the duty lawyer. This question explored whether there were any adverse impacts for SRLs.

Table 12 SRLs' feelings about the family court system after having received duty lawyer assistance

Option	SRL	N=14
(a) Better	1; 4; 11; 12; 13; 19; 21; 26; 27; 28; 32	11
(b) Worse	17	1
(c) No difference	2; 3	2
Total		14

Only one SRLs indicated they felt worse (N=1 of 14) or said there was no difference (N=2 of 14). The overwhelming majority (N=11 of 14) commented that they felt better after receiving help from the duty lawyer:

¹⁷ SRL 18

¹⁸ SRL 23

¹⁹ SRL 16

I feel much better having seen a duty solicitor today. I feel I can move forward with my matter. I know what forms I need. I have been referred to 2 private solicitors. I will come back if I end up acting for myself.²⁰

I may (now) understand what the hell is going on.²¹

Table 13 Would duty lawyer assistance have made any difference to the outcome?

Option	SRL	N=16
(a) Yes	7; 14; 15; 16; 18; 20; 22; 23; 25; 30; 31	11
(b) No	6	1
(c) Don't know	24	1
Did not respond	5; 10; 29	3
Total		16

Question 24 was intended to assess whether SRLs who had not seen the duty lawyer thought they would have benefited if they had. The majority (N=11 of 16) answered 'yes'; one said 'no' but did not explain why.²² The common view was that they would have had liked a greater understanding of what was going on in court. This result is consistent with the earlier finding that SRLs wanted information about procedural matters.²³ One said that the difference could have been that they received 'legal advice before, during and after' court.

It is worth noting that SRLs see a difference between the rhetoric of 'early intervention' and the reality.²⁴ Not one SRL thought that seeing the duty lawyer on their day in court was early enough, with the majority saying they wanted help before they went to court or as early as possible. This is consistent with

²⁰ SRL 8.

²¹ SRL 20.

²² SRL 6.

²³ See responses to Question: 21. Nearly half of the 16 SRLs who had not received help from the duty lawyer said they wanted help understanding the system (N=7 of 16), while half (N=8 of 16) said they wanted help with everything.

²⁴ Ronald Sackville, 'Access to Justice: Towards an Integrated Approach' (Paper presented at the National Access to Justice and Pro Bono Conference, Brisbane, 27–28 August 2010) argued that access to justice may be an ideal that cannot be fully realised and the gap between the ideal and the reality requires a more 'integrated' approach to justice, 233.

evidence that matters proceed with less delay through the courts or the dispute is resolved if SRLs receive early advice and assistance.²⁵

The fact that there were as many SRLs who had not used the duty lawyer as had²⁶ was of some concern. That a considerable number of SRLs did not know about the Scheme at all is an important finding. The Scheme cannot provide access to justice if the people who most need the service do not know about it. Improvements in raising awareness are discussed in Part II of this chapter; it is also dealt with in Chapter VI.

4.2 RQ2: What is the purpose and nature of the duty lawyer role?

No direct questions were put to the SRLs on the issue of identifying the purpose and nature of the duty lawyer role.²⁷ This may be seen as a weakness in the study. However, it is argued that even if the question had been put, it might have been difficult for SRLs to define what it meant for them, given they may not have knowledge about the Scheme, what services a duty lawyer can provide, and what policy issues determine how the Scheme works. For example, it is possible that an SRL might consider that the duty lawyer should perform the same tasks as a paid representative. This would be a misconception and well beyond the scope of the Scheme.

The question relating to the purpose of the Scheme was approached by addressing the needs of an SRL, including assistance outside the court and representation in court.²⁸ Those who had received assistance from the duty lawyer were invited to identify what they had received assistance for.

²⁵ Coumarelos et al 2012, n 10; Pascoe Pleasence, Nigel Balmer, Aoife O'Grady, Hazel Genn and Marisol Smith, (Pleasence, et al), 'Causes of Action: Civil Law and Social Justice' Final Report (Stationery Office, London 2004).

²⁶ There were 16 participants in each category; two of the surveys of SRLs who had not seen the duty lawyer were discarded as they were incomplete. The response rate was calculated as N=14 for those who had seen the duty lawyer and N=16 for those who had not. For questions to which the entire set provided responses, N=30.

²⁷ This question was put to all other participants in the study.

²⁸ These aspects have been cited as an important element in identifying and meeting the needs of SRLs; see Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of

Question 10 was directed at SRLs who had received assistance from the duty lawyer to find out the range of services they accessed. SRLs who had not seen the duty lawyer were asked a similar question (see below). Responses would help in understanding the nature of the advice which SRLs received or would like to have received.

Table 14 Matters with which the duty lawyer provided the SRL assistance

Option	SRL	N=14
(a) Filling out the documents	1*; 3*; 4*; 11*; 12; 13; 17*; 21; 26*; 27; 28; 32	12
(b) Appearing in court for you	2*; 3*; 4*	3
(c) Getting an understanding of the system	1*; 2*; 3*; 4*; 11*; 17*; 26*	7
(d) Assisting in negotiations with the other party's lawyer	3*; 4*	2
(e) Attending mediation with you	4*	1
(f) After the court event, to explain what went on or what you had to do	4*	1
(g) Other, please specify	19	1

The question was approached differently by SRLs: most provided multiple responses,²⁹ others nominated only one response³⁰ and one wrote 'all'.³¹ It is not clear from the surveys whether those who provided a single response did so because that was the only help they received (or would have liked to receive), or because they did not know that multiple responses were possible.

This question might have been better phrased by asking specifically what help they would have *liked* to receive. However, there was scope under 'other, please specify' to make additional comments. Only one respondent said 'advice on adult child maintenance'.³² It may be a failing of the question that 'legal advice' was not provided as an answer option, although there was an open question at the end which did elicit commentary.

In Question 21, SRLs who had not received assistance were asked to indicate what help they would have liked to have received from the duty lawyer. This set

Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013).

²⁹ Multiple responses are indicated by an asterisk. SRL: 1; 3; 4; 11; 17; 26.

³⁰ SRL 12; 13; 21; 27; 28 and 32.

³¹ SRL 4.

³² SRL 19.

of SRLs also provided multiple responses. Although the question was in Section B, it attracted two responses from two SRLs who had received assistance. Those responses have not been included in the following table.³³

Table 15 How could the duty lawyer have helped?

Option	SRL	N=16
(a) Filling out the documents	7*; 18*	2
(b) Appearing in court for you	6; 7*; 20*; 24*; 29	5
(c) Getting an understanding of the system	7*; 10*; 15*; 18*; 20*; 22*; 24*	7
(d) Assisting in negotiations with the other party's lawyer	7*; 10*	2
(e) Attending mediation with you	10*; 25	2
(f) Other – all of the above	10*; 14; 15*; 16; 22*; 23; 30; 31	8
Did not respond	5	1

It is notable that half of SRLs (N=8 of 16) said 'all the above', confirming views expressed in previous literature that SRLs have multiple legal problems and require a range of services³⁴ which the Scheme has the potential to provide.

(i) Providing SRLs with advice on the merits of their matter

One of the primary considerations of the literature focusing on legal assistance schemes for SRLs is that they can act as an effective referral service to more appropriate forums or to divert unmeritorious matters from the courts.³⁵ SRLs who had received help from a duty lawyer were also asked about how they would respond to advice from the duty lawyer that their matter was not likely to be successful.

³³ SRL 4 and 21.

³⁴ Coumarelos et al 2012, above n 10.

³⁵ Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Research Report, Law and Justice Foundation of NSW, 2002), cited in Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce Attorney-General's Department, Commonwealth of Australia, (2009), 43; Coumarelos et al 2012, above n 10; Productivity Commission, above n 12, vol 1; PricewaterhouseCoopers, ('PwC') 'Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism' (November 2009) ('Legal Aid Funding'); Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions* (2014), 19 ('Allen Consulting').

Table 16 Response if the duty lawyer's advice was that the SRL's matter was not likely to be successful

Option	SRL	N=14
(a) Accept the advice and discontinue the proceedings	3	1
(b) Accept the advice and attend mediation instead		0
(c) Reject the advice and proceed regardless	1; 2; 4; 11; 32	5
(d) Other, please specify	12; 13; 17; 26; 27; 28	6
Did not respond	19; 21	2
Total		14

Answer options in Question 15 provided scope for SRLs to consider alternatives such as mediation, but not one respondent selected mediation as an answer. Accepting the advice was not something with which they appeared to feel comfortable.

Only one SRL indicated that they would discontinue the proceedings, while another who selected 'other' added a qualifying response:

Probably get another opinion and then accept the advice and discontinue the proceedings.³⁶

Over one-third (N=5 of 14) of SRLs selected 'reject the advice and proceed regardless', with one commenting:

I would have followed gut instincts and still had a go.³⁷

Of the nearly half (N=6 of 14) who had nominated 'other', the predominant theme was that they would like to give the matter some more thought,³⁸ with three (N=3 of 14) saying they would seek another opinion.³⁹ It was unclear whether that opinion would be from another free source or whether they would pay for legal advice.

³⁶ SRL 17.

³⁷ SRL 11.

³⁸ SRL 12; 26.

³⁹ SRL 13; 26 and 27.

One SRL who selected 'other' did not make it clear what action, if any, they would take but said: '[I would] take on board what advice was given'.⁴⁰ Two (N=2 of 14) did not respond to this question.

(ii) Providing SRLs with a 'reality check'

This question might have been better phrased by asking SRLs what they would have done or what other services they would access if they had been given a 'reality check'. The meaning of the term could be specified in the answer choices, indicating that it would involve the SRL, in effect, acting as their own lawyer. Answer options could have outlined what the SRL might have been expected to do, such as undertaking their own research to understand legislation, the rules of evidence and court procedure, drafting documents, talking in court and conducting meaningful negotiations. Outlining the difficulties might have encouraged SRLs to consider alternatives to litigation.

In summary, there is some inconsistency in understanding what services SRLs need from the duty lawyer. The majority of those who had received assistance were helped with documents, while those who did not see the duty lawyer said they wanted procedural advice. Regardless, the overwhelming response of both sets of SRLs was that they acknowledged they needed assistance in understanding or working through their family law dispute. It was an interesting finding that SRLs were not inclined to take the duty lawyer's advice about referrals to other services or to discontinue their proceedings through lack of merit. This issue will be explored in the next chapter.⁴¹

4.3 RQ3: What is the impact of the Scheme on SRLs?

To get an understanding of what perceived impact the Scheme may have on them, the SRLs who were not offered or received help were asked how they thought representing themselves affected their case.

⁴⁰ SRL 28.

⁴¹ Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 (1) *Journal of Law and Society* 156.

Table 17 Effect of self-representation on case

Option	SRL	N=16
(a) Disadvantaged me	14; 15; 20; 24; 25	5
(b) Improved my position		0
(c) No difference	6; 22; 30; 31	4
Did not respond	5; 7; 10; 16; 18; 23; 29	7
Total		16

Nearly one-third (N=5 of 16) said that self-representation disadvantaged them. Not one respondent said that their position was improved as a result of self-representation, but a quarter (N=4 of 16) said that it had made no difference. One added the comment 'don't know'.⁴² Unfortunately, there were a high number (N=7 of 16) of SRLs who did not respond to this question.

Question 13 sought SRLs' views on how they perceived the court system had an impact on them.

Table 18 Did SRL feel rushed or pushed towards settlement?

Option	SRL	N=14
(a) Yes	3; 17	2
(b) No	1; 2; 4; 11; 12; 21; 26; 27; 28; 32	10
(c) No opinion	13; 19	2
Total		14

Of the 30 SRLs who participated in the survey, nearly half (N=14 of 30) indicated they had attended court or had accessed court services. This set was asked if they had felt rushed or pushed towards settlement. The responses would identify SRL concerns and determine whether there were any issues which the duty lawyer could address.

Nearly three-quarters (N=10 of 14) said that they did not feel rushed or pushed. Surprisingly, one of those SRLs responded to the next question by saying that they were rushed or pushed by the judge of the FCC, the other party's lawyer

⁴² SRL 7.

and the other party.⁴³ Only two (N=2 of 14) clearly said they were being rushed or pushed and they gave multiple answers indicating the FCC judge, the other party's lawyer and the other party.⁴⁴ One selected every category of answer options, from the FCC judge to the other party, excepting the family consultant and the duty lawyer.⁴⁵

Table 19 If SRL felt rushed or pushed towards settlement, by whom?

Option	SRL	N=4
(a) the duty lawyer		0
(b) Judge of the Family Court		0
(c) Judge of the Federal Circuit Court	1; 3; 17	3
(d) The Registrar	17	1
(e) The Family Consultant		0
(f) The lawyer for the other party	1; 3; 17	3
(g) The other party	3; 17	2
(h) No opinion – not attended court yet	13; 19	2

The responses to Question 14 are set out below in order of ranking, noting three of the four respondents selected more than one answer:

- Federal Circuit Court Judge (N=3)
- Other party's lawyer (N=3)
- Other party (N=2)
- Registrar (N=1)

It is notable that no SRLs said that they felt rushed or pushed by the duty lawyer, a Family Court judge or a family consultant. Two SRLs indicated they had not attended court as yet and therefore had no opinion.⁴⁶

(i) What is the impact of self-representation on SRLs themselves?

Research indicates that people who represent themselves are likely to face considerable difficulty in presenting their case, regardless of the merits of their matter or their socio-economic and educational backgrounds.⁴⁷ Apart from

⁴³ SRL 1.

⁴⁴ SRL 3.

⁴⁵ SRL 17.

⁴⁶ SRL 13 and 19.

⁴⁷ Coumarelos et al 2012, above n 10; Productivity Commission, above n 12.

being disadvantaged by their lack of legal knowledge, which might impede the progress of their matter, SRLs are more likely to have mental health issues⁴⁸ or suffer emotional stress.⁴⁹ Differences in mental and physical health and literacy standards of Tasmanians in comparison with other jurisdictions affect how SRLs experience the family court system.⁵⁰

Self-represented litigants who had received the help of a duty lawyer were asked whether the duty lawyer could have done anything more to improve the service to them.

Table 20 Could the duty lawyer have done anything more to improve the services to the SRL?

Option	SRL	N=14
(a) Yes	17; 26; 27; 28	4
(b) No	1; 4; 11; 12; 13; 19; 32	7
(c) Don't know	2; 3; 21	3
Total		14

⁴⁸ Pascoe Pleasence and Nigel Balmer, 'Mental Health and the Experience of Social Problems Involving Rights' (2009) 16 (1) *Psychiatry, Psychology and Law*, cited in Macfarlane, above n 28, 32. Macfarlane says, 'The same article points out the causal connection between experiences of the courts and legal issues and deteriorating mental health'.

⁴⁹ Pleasence and Balmer, *ibid.* Also see Nanette Schrandt, 'Report of the Ethics and Professionalism Working Group', (2001) 70 *Fordham Law Review*, 375.
<<http://ir.lawnet.fordham.edu/flr/vol70/iss2/9>>.

⁵⁰ The 2007–08 National Health Survey found that 11.1% of the Tasmanian population reported having a long-term mental or behavioural problem that was identified by a doctor. ABS figures show that over two-thirds of persons 18 years and over, 70.3% of Tasmanians, experienced low levels of psychological distress, while 18.7 of the population reported moderate levels of distress. About 11% reported high/very high levels of psychological distress. Of those reporting high/very high levels, people aged 45–64 years accounted for 44.4%, followed by those aged 25–44 years (24.3%). Around 46.1% of Tasmanians aged 18 years and over reported some form of disability. Australian Bureau of Statistics, *National Health Survey: Summary of Results* (2007–08), <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1307.6Main+Features13Dec+2010>>. Also see Coumarelos et al 2012, above n 10; Bill Eddy, *High Conflict People in Legal Disputes* (HCI Press, 2009). An Australian Mental Health Study in 2007 suggested that 20% of the Australian population has a personality disorder: <<http://www.aihw.gov.au/mental-health/>> cited in Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants—The Dark Side' (2014) *Access to Justice* Paper 32, <<http://www.civiljustice.info/access/32>>. This study suggests that 'while many people with mental health issues may be able to represent themselves successfully ... some with personality disorders or maladaptive traits may be more likely to be involved in conflict and be less able to negotiate agreed outcomes', and that it is 'less likely (SRLs) can ... engage in a positive, constructive or rational way in other court-related interactions', 4, 8.

Half (N=7 of 14) said they did not think so and nearly one third (N=4 of 14) indicated they were not content.⁵¹ The comments of three of the SRLs who said 'Yes' ⁵² are discussed in Chapter V.

In summary, most of the SRLs who had represented themselves believed that they were at a disadvantage. The majority of those who had been assisted by the duty lawyer were very positive about and grateful for the service and felt better about the outcome. A small minority said that the judge or the other party's lawyer had rushed or pressured them during a court event, suggesting they may not have had a good experience. The service provided by the duty lawyer was rated highly by the majority of SRLs. However, some SRLs felt strongly enough about some aspects of the service that they provided comments (discussed in Chapter V).

It was notable, however, that very few SRLs would be diverted from the court system, even if the duty lawyer advised them that their matter lacked merit. This response may relate to the stage of an SRL's progress through their dispute. This issue is the subject of further discussion in the next chapter.

4.4 RQ4: What improvements could be made to the Scheme to better deliver the duty lawyer service?

It was intended that research Question 25: How can the Family Law Duty Lawyer Scheme be improved? be put to all participants in the survey. However, as noted previously, the lack of clear instructions to SRLs who had been assisted by the duty lawyer that they could respond to this question may have affected the response rate.

Only three (N=3 of 16) of the 16 SRLs who had not seen the duty lawyer responded to this question, with one response being more of a complaint: the SRL wanted the duty lawyer to 'be available for longer periods of time. I was here at 10 am and had to wait till 1 pm for help'.⁵³ By contrast, nearly one-third (N=5 of 16) of SRLs who had not seen the duty lawyer made valuable

⁵¹ SRLs responding 'Don't know': 2; 3 and 21.

⁵² SRL 17; 26; 27 and 28.

⁵³ SRL 11.

suggestions. There was a demand for more duty lawyers to be available more often,⁵⁴ and at times outside the day an SRL has their matter in court.⁵⁵ Some SRLs who had not used the duty lawyer service and did not respond to this question provided comments in their response to Question 18, which asked if the duty lawyer could have done more to improve the service.⁵⁶ These comments have been incorporated below.

(i) Extended duty lawyer time

SRLs who had received the help of the duty lawyer seemed to suggest that they wanted more duty lawyers, that the duty lawyer give more time to their matter and be available at different stages of the proceedings. One SRL said that the duty lawyer should ‘be available more than one morning at courts’.⁵⁷ Another wanted ‘[m]ore solicitors more often. Maybe having the ability to actually follow individual cases through the court’.⁵⁸ It is not clear whether this SRL was unaware of the difference between the limited representation model of the duty lawyer or just wanted a lawyer to help all the way through the process.

One SRL who had not seen the duty lawyer was clearly influenced in considering the future conduct of their matter:

If and when I am forced to go to the family court by myself, the more access I have to a duty solicitor the better.⁵⁹

Previous research has found that while SRLs appreciated the assistance they received from the duty lawyer, there was also some dissatisfaction.⁶⁰ Three SRLs expressed frustration:

⁵⁴ SRL 14 and 28.

⁵⁵ SRL 14.

⁵⁶ See Table 21.

⁵⁷ SRL 4.

⁵⁸ SRL 13.

⁵⁹ SRL 14.

⁶⁰ Macfarlane, above n 28. This report sets out reasons why some SRLs in Canada are dissatisfied with their lawyers and choose, or have to, represent themselves. These range from ‘doing nothing, ‘not interested in settling the case’; ‘counsel not listening or explaining’ and ‘counsel made mistakes/was not competent’, 44–47. It also notes that while some SRLs appreciated help from duty counsel (duty lawyers) they complained that ‘court duty counsel models’ are ‘time limited’ and ‘leave them more confused, and even panicked, than before’.

Be available more often and at other times because of my work commitments.⁶¹

They could have been available for more time during the week, not just one hour.⁶²

One SRL had a number of issues which caused distress:

Not be so rushed. Have more time available so I'm not going home unsure. Be available on more days. Advice in detail what may be encountered at court appearances. Explain things such as when/how to speak up or ask for a break to get some extra advice. Be available to help with in-court proceedings.⁶³

(ii) Raising awareness of the Scheme and the services the duty lawyer provides

SRLs who had not received the help of a duty lawyer were also asked how the Scheme could be improved. Unsurprisingly, they tended to suggest that one way of raising awareness is to advertise the Scheme 'so people know about it'.⁶⁴ Another thought that information should be available 'through Centrelink and local newspapers'.⁶⁵ Better access to the duty lawyer, knowing when and where they were available, were also noted as areas for improvement.

One SRL expressed some concern about not knowing about the duty lawyer:

If there actually is one, why has no-one told me about it?⁶⁶

One SRL thought more advertising would help and suggested that information should be sent out to all SRLs 'to tell people about [the] duty lawyer'.⁶⁷

One SRL indicated that access to a computer and printer would be useful.⁶⁸

Macfarlane notes that 'duty counsel models are in serious overload' and says there is a need to reassess this service model.

⁶¹ SRL 27.

⁶² SRL 26.

⁶³ SRL 17.

⁶⁴ SRL 23.

⁶⁵ SRL 15. Centrelink is the Australian Government agency responsible for delivering a wide range of services and unemployment benefits to Australian's who are on a low income or are without an income. Centrelink payments and services are available from the Commonwealth Department of Human Services.

⁶⁶ SRL 20.

⁶⁷ SRL 18.

(iii) Summary of SRL surveys

SRLs who were satisfied with the duty lawyer still expressed some frustration with the service. Those who did not know about the duty lawyer said they believed they would have benefited from receiving help and would have likely used the service if they had known about it. SRLs who both did and did not use the service indicated that more information about the duty lawyer was required, and made suggestions about raising awareness of the Scheme. There was a clear demand for the service, although there may be a misunderstanding about the range of services the duty lawyer provides.

It is notable that SRLs, whether they had used the Scheme or not, considered that it offered more advantages than disadvantages. The level of satisfaction from those who *had* used the Scheme is also a positive outcome. The SRLs who thought the duty lawyer could have done more for them provided significant insights into how the Scheme could be better targeted and delivered. Overall, from the SRLs' viewpoint, the Scheme has been successful, rating as a 'good' and 'very good' service. There was guidance from the SRLs as to the type of assistance they needed to help them work through their dispute and what the duty lawyer could do to give them a more positive experience of the family court system. SRLs wanting more time with the duty lawyer beyond the day that their matter was in court is discussed in Part II of this chapter, dealing with changes made to the duty lawyer service as part of the action research process.

The data from SRLs confirmed the difficulties experienced by people navigating the family law system without representation, identified in previous commentaries.⁶⁹ The data were compared and contrasted with those obtained

⁶⁸ SRL 26.

⁶⁹ Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999); George Brandis, 'Lack of Access an Impending Social Crisis', *The Australian*, 1 June 2012; Coumarelos et al 2012, above n 10; The Law Society of NSW, 'Law Week in NSW: Law and Justice in Your Community', 24 April 2012, <<http://www.lawsociety.com.au/about/news/598243>>: 'Trying to navigate the legal system or accessing legal information about what to do when faced with a legal issue can be overwhelming for many people in the community,' Justin Dowd, President of the Law Society; Hunter et al, above n 35.

from the other key participants in the family court system and are interpreted in the next chapter.

B.1.B Interviews with the judges

The three judges were interviewed on 29 August, 9 September and 8 November 2013.⁷⁰ As Tasmania is a small jurisdiction, neither the court in which the judge presides nor its location, or the gender of the judge is identified.⁷¹

The interviews with the judges explored how they responded to SRLs in their courts and how the Scheme worked within the paradigm of the adversarial system. Apart from the questions put to the judges, the interview was an open conversation which allowed them to elaborate on their understanding of the purpose, nature, availability and usefulness of the Scheme.

4.1 RQ1: How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?

This question was not put directly to the judges. In the introductory conversation on the role of the Scheme, access to justice arose as a theme as to what SRLs should expect of the family law system:

I think whoever they are; they have a right to be heard. From my perspective, that's important.⁷²

(i) At what stage of the proceedings do you think the duty lawyer should become involved and would be more effective?

This question was identified as a theme under access to justice. The aim was to hear the judges' views on whether they thought the Scheme operated as an early intervention service and, if so, how effective was the duty lawyer in assisting SRLs before their problems escalated. There was some discrepancy in the responses. Judge 2 clearly said that the Scheme was not an early intervention strategy:

⁷⁰ Reference to the interview with the judge is in order of the date of interview.

⁷¹ This was a requirement of the Research and Ethics Committees of the FCA and FCC.

⁷² Interview: Judge 2.

The early intervention system is already there. That's in the family relationships centres and Relationships Australia and all of those things. They're the early intervention services.

Judge 3 thought that there was benefit if the duty lawyer's intervention could be before an SRL was in court but did not explain, nor was asked, what form the intervention might take:

Well, in the system, before they start proceedings presumably, yes.

Judge 1 considered that the duty lawyer's attendance when an SRL's matter was in court represented early intervention:

Well, it's traditionally been sort of on the first return dates that Legal Aid provides someone to be here.

In response to the question as to what stage the duty lawyer can be most effective, Judge 2 said:

I'd like to see a duty lawyer there on the first duty day. I'd like to see duty lawyers helping with affidavits and duty lawyers on a hearing. Perhaps not even for the whole of the hearing.

Well, it's a bit like you put the Band-Aid on the wound, don't you? I'd like to see a duty lawyer ... Anywhere ... I think at some levels in a real world, we're not going to be able to do that. ... The stuff that gets to our courts — I mean, they're the ones that we see in the back of the ambulance.

Following up on the medical analogy, the judge was asked whether the duty lawyer service was a triage system:

I think so. I mean that's how I see it and that is when you have the duty solicitor⁷³ at the first return date of an application in a duty list; you then have them there, get them off—send them off to a legal referral centre for their affidavit, but don't have a solicitor do all the typing and all the expensive part. Go

⁷³ The term used in this study is 'duty lawyer'. The quotations from participants in the study appear verbatim.

away and do it yourself. ... You need the surgeon who is going to clean up the wound and make—send them to X-rays and all those things.⁷⁴

Judge 2 compared the ideal with the reality:

While in an ideal world it would be lovely to have some duty lawyer sitting here full time waiting for an unrepresented litigant to come in and sort of fill out a bit of paper and put it back across the desk, and you know, help them with that, let's face it, no Legal Aid Commission has got the funds to have somebody sit here twiddling their thumbs waiting for somebody to arrive.

The judge pointed out that the duty lawyer could help SRLs at different stages of the proceedings; again, identifying what would be 'perfect' and how the duty lawyer could fit into that model:

But each step you take increases the scope of it and increases the cost, and the scope for a broader duty lawyer. I mean the perfect situation would be, as I said, a duty lawyer available in a court whenever a judge is sitting ... But I think the more roles we can get of a duty lawyer ... they have pretty good protocols about what they can do and what they can't do ... Is it perfect? No. Does it work? Probably ... that's the thinking we need with the duty lawyers, that we apply them when they first get in there for a really good triage and then you apply them later on for affidavits if they're necessary.

It was suggested by the researcher that the intervention in negotiations with the other party's lawyer was an example of SRLs receiving some equity in the proceedings:

Question: Is there is a role for a duty lawyer at (any) stage if a person is unrepresented and there is counsel on the other side, to participate in the negotiations?

The common view from judges about this is best reflected in what Judge 3 had to say:

Quite definitely ... Because they — for all sorts of reasons ... they don't know the law, they don't know court procedures, they are often therefore quite nervous, and their nervousness can be translated into anger, or — you know, so

⁷⁴ Interview: Judge 2.

I would think we can all picture situations where we might get more stropky when we're not quite so sure of our ground, and so I think that's ... they're just generally, in advocating their own position, at a disadvantage if they're up against a very skilled lawyer who is quite used to advocating his client's position on a daily basis.

(ii) How do you think SRLs could be made more aware of the Scheme?

One judge suggested the Law Society should tell people who ring for advice; another said:

So there will be tough times. But how we better use those resources and get all the good ideas and devise better ways to do things — I mean don't set it in concrete, but really think about what the role of the duty lawyer is, and how you can be more efficient in that role, how you collect clients, how you catch them ... Pretty simple stuff. If somebody is unrepresented — well, first of all, everyone should have to — most people nowadays have an email address. If someone is unrepresented and two days before the hearing they are still unrepresented, an email should automatically go from the court whether it's the Family Court or the Federal (Circuit) Court saying we note you're unrepresented. If you're represented, great; if not, there's a duty solicitor and here's the map.⁷⁵

Judge 1 suggested:

Perhaps the counter staff should be telling people — I mean with respondents who just turn up at 10 o'clock they wouldn't know, but if it's unrepresented litigants perhaps they could say, 'Look, a duty lawyer will be here from 9 o'clock even though the list doesn't start until 10. You know, you may want to speak to the duty lawyer beforehand,' whatever, that sounds like a good deal.

Judge 3 offered to bring the service to the attention of SRLs in court:

Well, when I think about it, it [the duty lawyer service] should be on call or there should be a notice, you know. I should be able to say, 'Look, do you have someone acting for you? No? Do you want someone to act for you? Yes, but I've been refused Legal Aid or I've got no money' then I would stand it down for 10 minutes and say, 'let's get a duty lawyer in'.

⁷⁵ Interview: Judge 2.

In conversation, the duty lawyer put it to the judges that although there is a sign in both the Hobart and the Launceston courts, ‘the sign is actually near the toilets’.⁷⁶ When it was suggested that it would be helpful to SRLs if prominent signs advertising the duty lawyer could be put up in the foyer, registry and in the areas outside the courts, Judge 3 responded enthusiastically:

Well, they (SRLs) should be told. ... I still think we should have a sign. I'll get onto that. The counter staff needs to do it. They need to. I can't see how it could be done any other way. If they won't take any notice of the signs, yes.

The judge went further, offering that an announcement be made prior to the commencement of a court duty list.

Well, all you need to do is say, ‘A duty lawyer will be available on duty list days’. ... At the beginning of the duty list, I could say — to let self-represented litigants know there is a duty lawyer available here if you need any assistance ... well, it's not my job, but I'm happy to help. I meant that's going to help them, it's going to help me; it's going to help everyone isn't it? I haven't got a problem it'll only take a second.⁷⁷

(iii) What are the benefits of the Scheme?

The judges were asked what benefits there might be for SRLs when the duty lawyer intervenes. The responses provided an interesting insight into their views about the difficulties experienced by some SRLs. Judge 2 acknowledged the importance for SRLs to have ‘someone to talk to:’

It offers them, someone, to talk to who will understand what's going on in that court. It's a totally new environment for them. They turn up, some of them lost, full of anger, fear, every human emotion, and you can see them go out and they'll talk to somebody. Whether it's the man who needs to be told, ‘Look, you've served 15 years for doing this to this woman, it's not going to happen,’ or for the woman who is barely able to speak, or sometimes a man who is barely able to speak, completely inarticulate. And if you have someone competent to talk to them, sit them down, offer them a glass of water or a cup of coffee and just say — ... just a one-to-one where they're not in front of a room full of

⁷⁶ Researcher's comment, Interview: Judge 1.

⁷⁷ Interview: Judge 3.

people, not in front of this very strange [judge] who is sometimes barking at lawyers because they're a bit — there's a lot of work on and the lawyers haven't done it properly and we're tired and a bit irritable ... it's a pretty scary environment.

(iv) What practical difference (whether positive or negative) has the intervention of the duty lawyer made?

When asked whether the duty lawyer's intervention made any difference to the way a matter went through the court, the judges all made favourable comments. Judge 1 said that a duty lawyer's intervention made 'a huge difference'⁷⁸ while another said:

We've got to give them (duty lawyers) some dignity in the legal system so that they are acknowledged as being an important part ... [We must not] diminish what the duty lawyer does and their sense of value in themselves and their work.⁷⁹

Judge 3 indicated that the duty lawyer's intervention progresses the matter through the court and towards resolution:

I do notice that when [the duty lawyer] come(s) back into the room, the matter can either resolve or progress to the next stage and that (the) self-represented litigants (have) obviously got a better understanding. Also it's difficult for them to — they would feel in an unfair situation where they've actually got to talk to a lawyer because they feel that person is legally trained and they're not, they don't know if what they're going to agree to is right or not, so they obviously feel a lot better having a legally-trained person who can give them some advice and who can actually talk directly to that lawyer rather than them having to.

In the next chapter, these responses will be compared with those of the SRLs in relation to the benefits of having a duty lawyer.

⁷⁸ Interview: Judge 3.

⁷⁹ Interview: Judge 2.

(v) Is it an advantage that SRLs have an understanding of the court system?

Judge 3 thought that the duty lawyer giving SRLs an understanding of what is going on in court is a great advantage, and gave an example:

that week I had quite a few self-represented for interim hearings ... On two occasions they ... had no understanding, like they had their supporters club behind them and — egging them on, 'No, go for it, go for it', so I would have to have the hearing. I had two hearings and two sets of reasons when it was blatantly obvious what was going to happen. If a duty lawyer ... could say, 'Look, I heard what the judge said' and confirmed that ... that's how it is, and just maybe explain to them, they might actually understand.

This judge also commented on the benefit of the SRL having time with the duty lawyer outside the pressure of the courtroom:

for that person obviously they're going to get the benefit of [the duty lawyer] in a private room talking to them so they've got more time to be able to understand ... I mean there must be pressure on them when they're in the court.

(vi) To which proceedings should the duty lawyer give priority?

How duty lawyers prioritise their service was not specifically put to the judges. The issue of family violence arose in the conversation when Judge 2 commented that a duty lawyer can assist alleged victims in putting their case before the court by telling them what needs to be included in an affidavit:

[Violence], it's such a factor in our court ... I want to know about the violence ... why are you [the SRL] afraid?

This judge also wanted the duty lawyer to appear on behalf of an alleged victim:

And ... warning a court where you'll [the duty lawyer] stand up and say, 'This is a matter where there are serious issues of violence, your Honour;' ... you will have the court at least being alerted to that.

The judge was very clear about the difficulties experienced by victims of violence and considered the duty lawyer had a role to play in supporting the victims:

Then you've got people, particularly victims of violence, who are struggling with how to articulate that violence because they feel shame, they feel embarrassment, they feel blame as you know, and for them to even tell their story they need a lot of work. I mean they need a lot of work in terms of mental health issues, but there is also as you know in practice a lot of work for you to get their trust before they'll tell their story, and if we don't hear their story we don't know what risks there are to them or to their children. And when I sit up on a bench with funny clothes, in an environment often when they've got their ex sitting there cracking his knuckles as he used to do before he did them over, it's pretty hard in those circumstances for them to tell me the story. Now, if I know there's domestic violence I can then put them in a separate room. I can have someone there whom they trust just holding their hand.

Judge 3 said the duty lawyer should assist the alleged victim, and visualised the ideal:

I know it's pie in the sky, it would be the best thing to have [the duty lawyer] there for [defendants] too, but from the resources point of view I can't see that happening ...

(vii) Are there any limitations of the Scheme?

This question related directly to the research question which sought participants' views on how the Scheme could be improved and thereby increase access to justice for SRLs.⁸⁰ The judges were asked whether there were any limitations which have an impact on the way duty lawyers do their job. Judge 2 said:

When we're designing our courts, we should, if we don't already have them, have facilities available for duty lawyers.

There was a recognition by another that the service was limited if it was not appropriately resourced.

⁸⁰ See Chapter IV: Part I: B.I.B: Question 25: What improvements could be made to the Scheme to better deliver the duty lawyer service?

You need internet access ... photocopy, printing ... you need some privacy and you do need [that] people need to know you're there.⁸¹

4.2 RQ2: What is the purpose and nature of the duty lawyer role?

(i) What do you think is the primary purpose and nature of the duty lawyer role?

The judges were asked what they thought was the primary purpose of the duty lawyer and what role they should play to assist SRLs and the court. The sub-themes identified under this research question are those which, at the macro level, improve the efficiency of the court and, at the micro level, facilitate support to provide advice to SRLs. The sub-themes are that the purpose of the duty lawyer is to:

- provide advice and representation for people not eligible for legal aid;
- advise SRLs about the merits of their matter and divert them from the court; and
- assist SRLs with their documents.

Previous research has found that the services performed by the duty lawyer reduce delays, promote options for settlement and divert unmeritorious matters from the court or refer SRLs to a more appropriate alternative forum.⁸²

(ii) To provide advice and representation for people not eligible for legal aid?

The judges were asked how the Scheme fits into the family court system. Judge 3 was clear that the Scheme was to help people who were 'not able to get Legal Aid' but did not say whether this was in relation to all types of disputes.

I see it as a means of assisting people who aren't able to get Legal Aid and to help them with the court procedures, and give advice if needed. ... But on the day clearly they're in court. They may not understand what they're there for and [the duty lawyer] can explain that. Also the actual progress of the matter, what's

⁸¹ Interview: Judge 3.

⁸² Suzie Forell and Michael Cain, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', (Law and Justice Foundation of New South Wales, November 2012); Productivity Commission, above n 10; Coumarelos et al 2012, above n 10.

going to happen to it, [the duty lawyer] can tell them on that day what's going to happen. I don't know whether they can get it by themselves ...

(iii) To provide SRLs with advice on the merits of their matter?

One of the propositions put to the judges in conversation was that the duty lawyer giving SRLs 'a reality check' by saying 'this is an indicator for you of what might happen'⁸³ provided opportunities for early resolution. Judge 2 responded:

It's extraordinarily valuable because a lot of people don't know when to give up'.
[And the duty lawyer can advise an SRL] when to settle ... and when not to settle.

Judge 3 considered that it was important for SRLs to know that proceeding with a matter which lacked merit could have consequences. The judge thought that the duty lawyer could say to an SRL:

Look, I heard what the judge said ... that's how it is, and just maybe explain to them, they might actually understand it's doing the right thing, giving them advice about what could happen, isn't it? ... That they understand the consequences of wanting their day in court.

(iv) To help SRLs with the preparation of documents?

In the context of what the duty lawyer could or should do for SRLs, the proposition was put to the judges that the duty lawyer assists SRLs with their documents prior to filing in the court. The judges had different viewpoints, with Judge 3 considering representation in court important⁸⁴ and Judge 1 supporting the idea that there is general benefit if SRLs see the duty lawyer before they file their documents:

I do think that it would be most useful. I don't know whether that is something that Legal Aid might consider or some of the community legal services might consider. It's something that would certainly help in terms of the efficiency of the way things go through the court. Apart from anything else, they would file

⁸³ Researcher's comment, Interview: Judge 3.

⁸⁴ Interview: Judge 3.

documents that make sense and that — particularly you get some people coming in with handwritten documents that what they're asking for is just — well, not likely to be anywhere near the sort of form of order that [could be made].

Judge 3 thought that this would be an unnecessary use of the duty lawyer:

I don't know if that would be the best use of the resource, actually ... Because that really — it's not going to stop anything is it? Okay, you're just helping them put the orders in. I mean basically by the time they come to the court they're going to know what each one is seeking presumably. I'd rather see the resources spent in the court at that stage.

Judge 2 disagreed, saying there are benefits for SRLs, while linking the issue of documents to delays in the court:

Most people struggle because they're dealing with something which is near and dear to them, and to try and put that into words. ... They don't understand, they don't have the concept of a chronology or thinking it through in a logical sense. They just don't have those skills. Most of them do a five page short affidavit, often saying what their feelings are rather than the facts ... so they don't chew up much time. It then takes a bit of time because often we need to pursue what was going on ... what it means is there may be some delay ...

Normally their affidavits are completely incomprehensible whether through lack of information or providing such dense information it provides no information at all. So the court then has to ... guess what the issues are.

4.3 RQ3: What is the impact of the Scheme on SRLs and other key participants in the family law system?

The judges were asked whether SRLs place more stress on and demand a lot more of judges. All acknowledged that self-representation created more work for them and agreed that they felt a responsibility to ensure that they avoided any perception that they were biased. Judge 1 referred to the need for judges to ensure that 'the playing field is level':

I'm sure it does create more stress because apart from anything else, you immediately think, oh God, you know, two unrepresented parties in this one, or — yes, it does because it puts more pressure on you to make sure that the playing field is level.

Judge 2 commented that a judge needed to be careful that judicial intervention not be seen as ‘a problem’ by both parties. The judge agreed with the proposition that the duty lawyer’s involvement avoided this problem:

Well, then I’m getting into the arena which can sometimes be seen by one party or another or both as the judge being an advocate for one side or another which undermines their faith in the system. I don’t think that’s huge, but I think it is a problem.

Judge 3 saw it as creating more work, unless an ICL was there to assist:

Clearly I’ve got to do the work, basically. I mean unless there’s an Independent Children’s Lawyer who helps quite extensively — if there wasn’t, yes, I mean I would have to be ... helping them.

(i) What is the impact of SRLs on the court system?

The judges were asked how the Scheme fits into the family court system. One judge noted that, while they had noticed an increase in the numbers of SRLs appearing before the court and ‘they don’t know what to do’, matters sometimes resolved more quickly. This comment supports findings in previous research.⁸⁵ However, SRL matters can cause delays and inefficiencies for the court system: for instance, if documents are incorrectly filled out or SRLs do not understand the court’s processes, the matter will need to be adjourned:

[I]n the last few months, I’ve noticed an increase in self-represented, probably particularly my last few weeks here, and I think that all sort of coincided with the cut-off in Legal Aid funding or the reduction. ... I mean we do have a few, but certainly on the mainland it’s much more common to have self-represented, and

⁸⁵ Robert Nicholson, ‘Can Courts Cope with Self-Represented Litigants?’ (Public Lecture for the 2003 Federal Court Visiting Judicial Fellow at Flinders University Law School on 16 September 2003) (2005) 8 (2) *Flinders Law Journal*; John Dewar, Barry Smith and Cate Banks, ‘Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia’ (Research Report No 20, Family Court of Australia, 2000); Hunter et al above n 35; Rosemary Hunter, ‘Litigants in Person in Contested Cases in the Family Court’ (1998) 12 *Australian Journal of Family Law* 171; Family Court of Australia, *Self-Represented Litigants—A Challenge* (Project Report, 2002); Justice Richard Stewart, ‘The Self-Represented Litigant: A Challenge to Justice’ (2011) 20 (3) *Journal of Judicial Administration* 146.

a lot of the time the matters resolve at the hearing because they don't know what to do.⁸⁶

Another judge had a contrary opinion:

Generally I would say they (trials) don't take as long ... because they [SRLs] don't know how to cross-examine ... so ... if you've got someone who is intelligent and is self-represented and they get the idea of cross-examining, it can take longer, but normally when they've got problems, you know, mental health problems or educational difficulties, they haven't got any idea, so obviously it's not as long.⁸⁷

(ii) What is the impact of SRLs on court staff?

The judges all acknowledged that SRLs cause stress for court staff, and agreed on the benefits of the duty lawyer providing them with advice and assistance:

It takes it [the stress] off court staff, it takes it off me a bit. I don't need to sit there in a busy duty list and try and explain to somebody what the, you know, what they should be doing and what their next step is or whatever...⁸⁸

(iii) What is the impact of SRLs on the other party's lawyer?

The judges commented on the impact of SRLs on the other party's lawyer:

Look, I'm quite sure [there is an impact]. I can see the lawyers getting frustrated because they're dealing with the individual.⁸⁹

The judge suggested that, as a consequence of the 'frustration', they had observed the other party's lawyer referring SRLs to the duty lawyer because 'it's going to make it easier for them':

Now, I sort of get the impression that sometimes the barrister for the other side will say, 'Look, you're unrepresented. Are you aware that there is a duty lawyer?' Because they know it's going to make it easier for them to have — and you

⁸⁶ Interview: Judge 1.

⁸⁷ Interview: Judge 2.

⁸⁸ Interview: Judge 1.

⁸⁹ Ibid.

know, they'll have somebody that they can almost talk on equal terms to sort of thing...⁹⁰

(iv) What is the impact on the other party?

One judge commented that the duty lawyer's assistance could negate any impact on the other party. When there was an SRL, the judge said there was a need to be mindful of the other person's perception of bias:

The hard bit is when you have one unrepresented and one not because then you can look as though you're doing too much for the unrepresented person. You've got to be careful there that it doesn't look like you're helping that person too much...⁹¹

(v) What is the impact of self-representation on SRLs themselves?

Judges were asked to comment on how self-representation affects SRLs themselves:

It depends on the individual a bit, but in the main, I think they're — most of them ... are unrepresented but not because they want to be. It's because they don't qualify for Legal Aid and essentially they don't have the spare capacity of funds to be able to pay for a lawyer, and so as I say, most unrepresented litigants aren't there because they, you know, they just think they're good enough to run it themselves. There are some. You get some, you know who — and they're the worst, I think, you know, because they just think they're right and clearly ... the person on the other side and that person's lawyer is wrong.⁹²

Another agreed that SRLs are adversely affected and commented on the important role played by the duty lawyer, and speculated on why SRLs might experience stress:

they've probably already been knocked back for Legal Aid which they think is unfair. They come to the court thinking everyone's going to be against them, perhaps. They've got the person on the other side that causes them stress. I think, yes if they know there's someone to help them I think it makes a huge

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

difference, and you can tell when they come back in. If they come back into the room with [the duty lawyer] and you can see it, because often the matter resolves.⁹³

(vi) Are there disadvantages in being self-represented?

The judges were asked whether they thought that SRLs were disadvantaged if they appeared unrepresented. One judge specifically identified the disadvantages that some SRLs confront when dealing with the family court system:

My suspicion is that they will be beyond significantly disadvantaged, particularly in our court, because most of the cases that come to our court involve serious issues of risk to the children, child or one or other of the parents. They often involve parents who have significant psychiatric, psychological disorders or other issues which they have — many of them haven't dealt with such as substance abuse, mental health issues. How are they to prepare affidavits? How are they to understand the language we speak? How are we to understand the language they speak?⁹⁴

Another said that there were advantages 'for everybody' when the duty lawyer intervened:

I think ... it generally makes it easier for everybody. Whether it be the staff at the counter or my staff or me or the person on the other side. ... And it certainly makes it easier for the person who needs the duty lawyer, because they then feel as though they've got somebody who is helping them. ... I imagine they don't feel quite so much of a disadvantage in that they haven't got a lawyer and the other side has, you know, so I think that helps a lot.⁹⁵

4.4 RQ4: What improvements could be made to the Scheme to better deliver the duty lawyer service?

The judges were asked whether they had any suggestions on how the Scheme could be improved. Without criticising the Scheme itself, the judges agreed that there was a need for the duty lawyer to be available for more than the one

⁹³ Interview: Judge 3.

⁹⁴ Interview: Judge 2.

⁹⁵ Interview: Judge 1.

occasion when an SRL's matter was in court and that there were extensive benefits to all those involved in the family court system if the duty lawyer could perform discrete tasks.

(i) Extended duty lawyer time

One judge thought it would be beneficial to SRLs if they could 'make an appointment'⁹⁶ for the duty lawyer to help them with their documents, and acknowledged that the duty lawyer 'would have to have allocated days and times for that to happen'.⁹⁷ Another said it would be the 'perfect situation' if the duty lawyer could be available 'whenever a judge is sitting'.⁹⁸ The judge suggested that more flexibility would be welcome:

I can't see why I can't say [to the duty lawyer], 'why don't you come in next — on Thursday morning, that's when Dad is going to be cross-examined on this point of this — can you come in and cross-examine him on that?

(ii) The duty lawyer to assist with interim hearings

One judge said they would appreciate duty lawyer assistance during interim hearings:

[T]he only thing is I would like — it would be really good, and I know it's the resources, but for Interim Hearings, it would be really good if [the duty lawyer] could be available to give them some advice... [even] if it's not possible to be there for the whole [interim hearing].⁹⁹

All judges had a common view that:

if you had more [duty lawyers] who had more time to deal with matters you would get a better result, yes.¹⁰⁰

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Interview: Judge 2.

⁹⁹ Ibid.

¹⁰⁰ Interview: Judge 2: 'I'd like to see a duty lawyer there on the first duty day. I'd like to see duty lawyers helping with affidavits and duty lawyers on a hearing. Perhaps not even for the whole of the hearing'; Interview: Judge 3: 'If (the duty lawyer) could do an introduction [at trial] just to see what the issues are and see whether you can assist in resolving it at the

(iii) Dedicated role as duty lawyer

In considering the question of the future of the Scheme, one judge commented that they considered it beneficial if the duty lawyer did not have their own in-house files:

I'd like [the duty lawyer] to be there every day, and that is so much better that [the duty lawyer] (doesn't) have [their] own files. ... We want the duty lawyer not to burn out. We want the duty lawyer to continue to work.¹⁰¹

(iv) Training for duty lawyers

When it was suggested by the researcher to the judges that duty lawyer work required specific training, one judge said:

Need to look at a way that you do training of duty lawyers, very effective training ... there are enough very qualified duty lawyers to cook up a training course and go to someone like College of Law or someone along those lines which can do it online. That would then mean you're not reinventing the wheel every time you get a new duty lawyer, and you're picking up a history of skill which would help.¹⁰²

The judge linked the benefits of having effective duty lawyers to better outcomes and a more efficient court system:

But just if you come along and you have somebody like you or somebody at your skill level saying, 'This is what we do. This is the training we get and this is how we can be of assistance to this client and these are the outcomes.

If you understand what the duty lawyer does and teach people to be effective duty lawyers and pick up the skills of the very good duty lawyers and pass them onto the not so good duty lawyers, if you've got 100 duty lawyers or 200 duty lawyers on the east coast of Australia and you can make them 20 per cent more efficient, you've picked up another 20 duty lawyers, haven't you? And that's where I think constantly asking to solve it with money isn't [always the answer and it isn't] going to happen.

beginning, yes, without having to sit through and actually conduct a trial, which [the duty lawyer] obviously couldn't.

¹⁰¹ Interview: Judge 3.

¹⁰² Interview: Judge 2.

(v) Summary of interviews of judges

The judges displayed a genuine concern about the problems encountered by SRLs in pursuing their family law matters through the courts. There was recognition that legally enforceable rights and duties underpin the legal system, but access to justice was essential to make those rights and duties real. For many people these rights and duties are purely hypothetical because they have no access to justice if it is based on the assumption that full representation is the ideal model. Judges supported the duty lawyer service as one which, although an imperfect model, provided significant advantages to SRLs and to the efficient running of the court system.

The judges recognised the real impact of self-representation and were united in their views that the intervention of the duty lawyer alleviated stress on all those involved in the family law system. They recognised that, for many SRLs, being represented by the duty lawyer in negotiations with the other party's lawyer also had the benefits of improving the chances of settlement and achieving a better outcome earlier in the proceedings. They considered the purpose of the Scheme was to help people who were ineligible for legal aid but could not afford a private lawyer; however, they also recognised that there were some people who would not accept help because 'they just know they are right'.¹⁰³

All judges perceived significant benefits to the family law system when a duty lawyer assisted SRLs. Matters proceeded more quickly through the courts when SRLs were provided with a 'reality check' on the merits of their matter and understood the court's processes and procedures. Although there was some difference of opinion as to when the intervention of the duty lawyer would be of most benefit to SRLs, there was agreement that there were advantages when the duty lawyer assisted at *any* stage of proceedings. There was support for duty lawyers providing discrete task assistance throughout the proceedings by offering advice or information at Interim Hearings or even at the trial stage. There was general agreement that the service could be extended to provide advice and assistance prior to the matter coming before the court. This

¹⁰³ Ibid.

assistance could be to prepare or amend documents, which would ensure matters proceeded without delay through the courts.

Finally, there was a consensus that duty lawyers give valuable assistance to SRLs and the court, and that there would likely be a greater demand for duty lawyer services as matters coming before the court became more complex and legal aid budgets diminished.

B. 1. C Results from the duty lawyers

(a) Introduction

The Launceston duty lawyer was interviewed on 29 August 2013.¹⁰⁴ The interviewer put some direct questions to her while others arose and were responded to in an open conversation between colleagues. The researcher provided her comments, which had been recorded in her research diary.¹⁰⁵

The interview questions for the duty lawyers sought to examine the background and experience of duty lawyers: what guides their practice; what are the benefits of the Scheme; what services do SRLs seek from them; and are there any limiting factors on their work? Finally, given their experience and practical viewpoint, what improvements could be made to the Scheme to assist SRLs and better prepare them in managing their disputes in the family court?

(b) Background information

(i) The researcher: - Family Law Duty Lawyer – Hobart¹⁰⁶

The researcher (the Hobart Duty Lawyer) was admitted as a practitioner in 1998. Since that time, both in private practice¹⁰⁷ and with LACT, she has predominantly practised in family law. She was appointed to the position of the Family Law Duty Lawyer in Hobart when the Scheme was introduced in March

¹⁰⁴ See Annexure C for document pack to the LDL.

¹⁰⁵ The comments of the Hobart duty lawyer are reported as 'Comments: researcher'.

¹⁰⁶ The comments made by the Hobart duty lawyer were recorded in the research diary. They were not made in conversation or during the interview of any of the participants.

¹⁰⁷ The researcher worked with the Hobart law firm, Wallace, Wilkinson and Webster from September 1998 until November 2002, and then with LACT until now.

2005. Early on, as the demand for the service did not fill the two and a half days for which it was funded, the duty lawyer took on in-house family law files. She also had files as an ICL and Separate Representative for the Child in the children's division of the Magistrates Court. In March 2012, the researcher commenced full-time study. She reduced her hours at LACT to one day a week and defined her job as only performing the duty lawyer role. Currently she appears in the duty lists of the Federal Circuit Court (FCC). She also provides a two-hour clinic session at the Commonwealth Courts Building.¹⁰⁸

(ii) Family Law Duty Lawyer - Launceston

The Launceston duty lawyer was also appointed in March 2005 when the Scheme was introduced.¹⁰⁹ Prior to that time, she had worked for approximately 18 months in a legal centre. She appears mainly in the Federal Circuit Court on duty list days as well as attending the divorce list in Devonport. She also works as a family law practitioner, having carriage of in-house matters, and is a Separate Representative for the Child in the Children's Division of the Magistrates Court. Since she was appointed, she has occasionally had extended leave and other lawyers in the Commission have performed the duty lawyer role during this time.¹¹⁰ She currently works four days a week. The funding to LACT for the duty lawyer position was for 0.5 FTE, or two and a half days a week.

(a) What guides your duty lawyer practice?

The duty lawyers addressed the question of how they did their job. This question was asked to provide context for the nature of the work duty lawyers do, and the people whom they help. Both said they did not receive any training prior to their appointment. When the Launceston duty lawyer was asked whether she would have liked specific training, she responded:

¹⁰⁸ The Family Court of Australia and the Federal Circuit Court are located in the Commonwealth Law Courts buildings in Hobart and Launceston.

¹⁰⁹ Responses from the interview with the Launceston duty lawyer are reported as 'Interview: LDL'.

¹¹⁰ Other lawyers in LACT performing the relief role of duty lawyer were not interviewed as they no longer worked for the Commission at the time of the research.

Yes, I mean look, it's not going to hurt doing those sort of courses, is it, doing like managing people (who have anger management issues)?¹¹¹

Duty lawyers have benefited from attaining skills and training to deal appropriately with SRLs who may be suffering from the emotional effects of a family law dispute or have disabilities.¹¹²

The researcher and the Launceston duty lawyer said they worked within the framework of the National Protocol.¹¹³ They recognised that the Protocol envisaged that they offer services to SRLs only on their day in court,¹¹⁴ and attended on an SRL only 'on one occasion only during the course of proceedings'.¹¹⁵ Both thought these provisions were unrealistic and limiting. The researcher¹¹⁶ recorded that she considered that the National Protocol represented a minimum standard of service delivery:

If I strictly followed that provision [3.2], in a small place like Hobart, I would soon run out of people to see. There are many people who have drug, alcohol and mental health problems (sometimes all in the one person).¹¹⁷ There is significant family violence. People like that usually are involved with a range of agencies and have multiple issues. They have had these problems for a long time; their lives are complicated. It shouldn't be surprising that the duty lawyer has to see these people more than once to come to grips with their problems and offer them advice.

¹¹¹ Interview: LDL.

¹¹² Coumarelos et al 2012, above n 10, 59.

¹¹³ Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme National ('Protocol')* (2007), <<http://www.aph.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subId=206418>>, [3.2]: 'Assistance by the duty lawyer will normally be provided on one occasion only during the course of proceedings'.

¹¹⁴ Ibid [2.1]: 'For the purposes of this Protocol, duty lawyer services mean assistance provided by legal aid commission lawyers (in-house practitioners) ... to unrepresented parties at the Family Court of Australia, the Family Court of Western Australia or the Federal Circuit Court *'in relation to an imminent court event'*, *Protocol* [2.1].

¹¹⁵ Ibid [3.2].

¹¹⁶ The comments made by the researcher as the duty lawyer are data for the purposes of the study. They are cited as comments from the researcher and are extracts from the research diary.

¹¹⁷ Coumarelos et al 2012, above n 10, 59.

Ultimately, it is the characteristic of the individual and the dispute rather than the guidelines which determine my response.¹¹⁸ If the person is vulnerable, a victim of family violence, elderly, from another culture or has a disability, then I see them more than once. I think the duty lawyer plays a protective role, helping those who might fall through the gap between services.¹¹⁹

The Launceston Duty Lawyer pointed out that the north-west of Tasmania is a small jurisdiction where the same people have multiple problems. The north of the state is not as well-resourced as the south, with limited options for SRLs to seek legal assistance beyond the Legal Aid Commission.¹²⁰ She has provided legal advice and assistance to SRLs on more than one occasion without it leading to de facto ongoing representation:

I usually make it clear [and say] — ‘All I can really do for you is to help you through today’; so that their expectation is it’s not an ongoing thing. ... I’ve seen people more than once, but we’re not supposed to see them more than once, but I mean that’s just not realistic. If someone is self-represented, I’ve had the same lady come a few times, and she’s — she needs help with a substituted service application and you know, each time you tell her the same thing, she (has to put into) this affidavit, but anyway, the last time she thought she found a lead so she tried that, so I sort of helped her through that and I said ‘look, next time, I’ll be here again.,’ and even though I’m telling her the same thing, it’s just nice to, and gives her that sort of sense of — you know, I’m — there ...¹²¹

The researcher and the Launceston duty lawyer said that it was necessary to stress to SRLs that this sort of intervention did not constitute continuous representation. The Launceston duty lawyer said:

¹¹⁸ Forell and Cain, above n 82. The Evaluation found that more than three quarters of all clients (76.6%) received help with only one matter over the nine-month reporting period; 11.5% of clients were assisted with two separate matters and fewer than 3% of clients were assisted with five or more matters, 32.

¹¹⁹ Comments: researcher.

¹²⁰ The Launceston Community Legal Centre and the North West Community Legal Centre provide legal advice and services in relation to family law. They do not provide representation. The Hobart Community Legal Service offers similar services but also conducts two free evening legal information advice clinics during the week, staffed by volunteer solicitors. There is always a family lawyer on duty, together with another lawyer providing general legal advice. HCLS has outreach services in Sorell and Bridgewater and a family violence solicitor operating in the Huonville area. Hobart also has the advantage of the Women’s Legal Service.

¹²¹ Interview: LDL.

I always explain that I am not their lawyer and they can't keep using the service on an open-ended basis. They all understand that and are just happy to have the help.¹²²

However, some clients were needy and persistent, and could become angry when told there was a limit to how many times they could receive assistance. Both the researcher and the Launceston duty lawyer, who considered they had sufficient experience to perform their duties at a high level,¹²³ put this comment into context by saying that they had the experience and maturity to handle SRLs who behaved badly.¹²⁴ Both had attended conferences and courses which provided them with skills to deal with difficult people.

4.1 RQ1: How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?

While there was no specific request for views on how the Scheme provides access to justice for SRLs, the theme was approached by looking at the benefits of the Scheme identified by the duty lawyers.¹²⁵

(i) At what stage of the proceedings do you think the duty lawyer should become involved and would be more effective?

The sub-theme of how the Scheme operates as an early intervention strategy relates to the supposition that providing SRLs with advice as early as possible improves the efficiency of the court, improves settlement options, and improves outcomes for SRLs.¹²⁶ The duty lawyers responded to this question in the

¹²² Ibid.

¹²³ The researcher previously worked as the LACT Criminal Law Duty Lawyer in the Hobart Magistrates Court, for over twelve months (2003–2004). Both duty lawyers were appointed in March 2012 and continue working in that position.

¹²⁴ Coumarelos et al 2012, above n 10, 24, citing Alexy Buck, Pascoe Pleasence, Nigel Balmer, Aoife O'Grady and Hazel Genn, 'Lone Parents and Civil Law; Their Experience of Problems and Their Advice Seeking Behaviour' (2004) 38 (3) *Social Policy and Administration* 253. The research finds that some behaviour is common to people who have legal problems, such as inability to recognise they have a problem and accept advice about or take responsibility for solving it.

¹²⁵ Question 9: What are the benefits of the Scheme?

¹²⁶ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Gathering Useful Information' (Final Report, Australian Centre for Justice Innovation, Monash University, 28 June 2012), 41, Appendix E, 85; T Sourdin and N Wallace, *Self-Represented Litigants Literature Review*, (Australian Centre for Justice Innovation, 24 May 2012); Forell, above n 12; Trevor Farrow, Diana Lowe, Martha Simmons, Bradley Albrecht and Heather Manweiller, 'Addressing the Needs of Self-Represented Litigants in the

context of considering the timing of their intervention, whether measures are in place to ensure SRLs are referred to the duty lawyer as early as possible and whether the timing affected outcomes for SRLs. The researcher's view is that she took a liberal interpretation of provisions in the National Protocol about when and how often she could assist SRLs:¹²⁷

I don't think it is helpful labelling the timing of an intervention. It sets up expectations which may not be able to be met. ... the duty lawyer service is part of a wider strategy which is all about providing SRLs with help at any stage of their matter ... seeing SRLs on the day their matter is in court is not early enough. ... Most SRLs do not understand anything about what goes on in court.¹²⁸

The researcher worked closely with court staff at the registry to ensure that SRLs were told about the duty lawyer as early in their proceedings as possible. If she attended on an SRL outside their court event, she might see them initially to advise on the appropriate forms they needed to complete and how to frame appropriate orders. She might see them again, once they had done a 'good draft', and help them to finalise their documents:

I have an excellent relationship with court staff which has been built over a period of time. ... I am confident that any SRLs who come into the court outside the duty list days¹²⁹ will be captured by court staff who will email me with their details. ... On duty list days, if I haven't realised there is a person needing assistance, the court staff will actually bring an SRL to me.

Sometimes there are difficulties in dealing with SRLs on their day in court:

those who have slipped through the net are usually captured, but that can sometimes be at the end of the day. ... they are usually tired, emotional and even angry and think that they are not being treated well by the court system.

Canadian Justice System' (A White Paper Prepared for the Association of Canadian Court Administrators, Toronto and Edmonton 2012) (Farrow et al); Kim Williams, *Litigants in Person: A Literature Review* (Research Summary No 2/11, Ministry of Justice, 2011); Macfarlane, above n 28.

¹²⁷ *Protocol*, above n 113, [2.1]: 'For the purposes of this Protocol, duty lawyer services mean assistance ... to unrepresented parties ... in relation to an imminent court event'.

¹²⁸ Comments: researcher.

¹²⁹ The FCC in Hobart usually conducts duty lists on the first Monday and Tuesday of each month.

In response to the question whether she considered there were benefits if SRLs saw the duty lawyer before the day their matter was in court, the Launceston duty lawyer said:

Yes, I think it would be better if you could get in a bit earlier. ... I think before if they're thinking about filing, before then.

She explained that the first day in court could also be a hearing day and commented:

I don't think it is [early intervention when] they're there on their feet. That's not early, and like this other one, he was at the end, he was at a contested hearing ... from what I've seen, now that the parties have to be there at the first return date and that's designed as an early intervention.

I think people's expectations of the procedure aren't ... they have no idea how long it's going to — their whole case, potentially, could be if it doesn't settle which is something the duty lawyer could always advise, so if you've got that opportunity to give them advice if they want it at the earlier [stage before they actually stand up in court] it would be nice.

(ii) What awareness is there about the Scheme and the services the duty lawyer provides?

The theme of knowledge and awareness about the Scheme was considered to be an important component of access to justice. The extent to which SRLs will know about their rights and options will depend on their awareness.¹³⁰ The researcher and the Launceston duty lawyer recognised the importance of SRLs knowing that there is a duty lawyer available. The Launceston duty lawyer was concerned that there might be a problem with this. Asked whether she thought SRLs were aware of the Scheme, she said:

¹³⁰ Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce, Attorney-General's Department, Commonwealth of Australia (2009). This report found that awareness of services such as LACs or the services they provided 'is low', 78. The report said: 'Improving awareness of ... services might also assist to improve access to justice' 33; 'Increased awareness of options in responding to legal issues—by service providers and the people involved—help people on the right part to resolution' 78; and 'Raising awareness (of these services) has significant potential advantages, including reducing the cost of dispute resolution, and providing stronger outcomes for people with disputes', 87.

most of them don't even know [what a duty lawyer is or that a duty lawyer exists]... yes, most didn't ... [Or that they can have the assistance of a duty lawyer?] ... No ... pretty much (none of them knew that).

When asked how the service is brought to the attention of SRLs in Launceston, she said:

Well, I've got a teeny weeny sign that's around the corner, so you actually have to go up, and I don't think — it's beyond the toilets even.

The researcher commented that signage in Hobart was likewise inadequate, with a small sign on the notice board which, in itself, was in an out-of-the-way area of the ground floor of the courts, also near the toilets, while the courts were on the first floor.

When it was put to the Launceston duty lawyer that, as SRLs usually go directly to the registry, it would be of benefit if court staff made SRLs aware of the duty lawyer and even more effective if a brochure could also be given to SRLs before they file their documents, she said:

if when they file their documents and the court staff can see that they're going to be unrepresented, that's probably a good place to say, 'Look, if you're going to file, this is the date that you're given,' maybe put something in with their documents.

(iii) What practical difference (whether positive or negative) has the intervention of the duty lawyer made for SRLs?

This sub-theme was identified as a component of understanding what part the Scheme played in expanding access to justice for SRLs. It is widely recognised that SRLs are at a disadvantage and may struggle with dealing with their legal problems.¹³¹ The researcher and the Launceston duty lawyer thought the Scheme went a long way to meeting SRLs' needs and that they made a positive

¹³¹ See Chapter I: H (ii) (c) discussing SRLs' experiences in Canada; also Chapter IV, B.I.B: Interview: Judge 2 said 'most people struggle ... [and] 'don't understand' the family court system. Coumarelos et al 2012, n 10, cited in Productivity Commission, above n 12, vol 1, 155, citing Queensland Public Interest Law Clearing House (QPILCH) Submission 58, 3, 133. The inquiry notes that there is an 'imbalance of power' when one party is not represented.

difference to the way SRLs experienced the family law system. The researcher said:

I think of it in a broader context beyond the legal system. It means giving SRLs information so they have a clear understanding of what they need to know and do to achieve the outcome they are looking for.

She provides advice in practical terms:

One way of making SRLs understand their rights is to use the simplest language possible to tell them what their options are and the consequences of each option. The decision is theirs. ... providing SRLs with this type of information empowers them because it gives them options.

In considering the question, the Launceston duty lawyer said, 'I think we do [make a difference]' although admitting that sometimes she met with resistance:

I always say, 'Look, it's up to you whether you want me to help you or not,' so I think they take what they want from you, and they will get what they want, and then if they think — I think 'I've had — I mean you have so many, don't you, you forget. I've had matters where they go, 'Yep, thanks for that, but I'd still like to say this to the judge,' and I will say, well that's up to you. It's your case. I'm not representing you'. So I really do make it clear that it's up to them at the end of the day...

4.2 RQ2: What is the purpose and nature of the duty lawyer role?

(i) The Scheme provides advice and representation for people not eligible for legal aid

The researcher considered and the Launceston duty lawyer was asked to identify what they thought was the purpose of the Scheme and what can a duty lawyer do to help SRLs. The Launceston duty lawyer said:

Most people that need the duty lawyer aren't eligible for Legal Aid.

She explained that, as Legal Aid was not granted in property disputes, there were a number of people who were not eligible for Legal Aid and could not afford a lawyer, and who might benefit from assistance on a discrete advice service basis:

For Tassie anyway, it might mean it's property and that's, you know — I mean we can certainly advise procedure on the property.

The researcher recorded:

I see my role in different ways, according to the situation. When I see SRLs in court during a busy court list, I have to do a triage. I assess who needs the most help urgently and deal with them. I ask any other SRLs in the list to wait and I will get to them. That is crisis management.

(ii) Do you give advice to SRLs about the merits of their matter?

This question involved the duty lawyers considering whether one of the purposes of their role was to provide an SRL with a 'reality check' about the merits of their matter. It was also intended to elicit comments about SRLs' responses. This aspect of the role was considered to be important by commentators who thought that the duty lawyer could act as a barometer and either divert matters from the court when they lacked merit or refer SRLs to more appropriate services. This function would reduce the impact of SRLs on the family courts.¹³²

The researcher said:

At whatever stage of the proceedings that I see SRLs, I give them a 'reality check'. I explain the possible consequences or outcomes if they proceed through court ... If I can discourage people from proceeding with unmeritorious or vexatious applications, then the whole family law system benefits. I know some people won't take my advice because they are determined to 'have their day in court'.¹³³ ... Most people say they appreciate being given an honest opinion.

When the Launceston duty lawyer was asked if she was blunt and brutally honest in terms of the merits of a person's case, she said:

¹³² Forell and Cain, above n 82; Productivity Commission, above n 12.

¹³³ Survey of SRLs, response to Question 15: If the duty lawyer's advice was that your matter was not likely to be successful, would you: (a) Accept the advice and discontinue the proceedings; (b) Accept the advice and attend mediation instead; (c) Reject the advice and proceed regardless; (d) Other, please specify. Only SRL 6 provided a reason for not using the duty lawyer, saying they wanted to speak to the judge directly.

Absolutely. I [say], 'I know what I need to know, and tell me this, this and this'. And of course naturally, they start to go on and tell you about their whole life and their case, which is understandable, but then I always bring them back to the procedural stuff and, 'This is what I need to know,' and they — most of the time they appreciate that and they go, 'Yep, yep, right, right.', and they take it in, so yes, most of the time they take your advice, except I think it's those — their fear that makes them want to [go on].

In response to how SRLs reacted when told their matter lacked merit, the Launceston duty lawyer said that 'not many' took the advice:

I remember a particular matter where ... this person ... was a bit difficult ... and no matter how much I tried ... how much I explained the merits of what [she was] doing ... but just no way. They wanted their day, and if it ended in costs or ended in whatever, [they] didn't care.¹³⁴

She agreed with the proposition that sometimes SRLs appreciate being given realistic advice. She described that some SRLs had said:

'[That's] the first time anyone's ever said that to me' or 'No-one's ever told me that, if I'd known that, I wouldn't have ...' Sometimes, 'I didn't know that,' or 'yes, I'm new to all this'. So that's where the appreciation comes in.

(iii) To which proceedings should the duty lawyer give priority?

This question relates both to the research question about access to justice and the purpose of the Scheme. The National Protocol sets out the matters the duty lawyer needs to take into account when considering how to prioritise assistance.¹³⁵ The researcher said that she thought the purpose of the Scheme was to help those most vulnerable, and gave examples:

The SRLs in this category are often grandparents involved in children's disputes or people whose property pool is small, or the only thing they are fighting over is who will be responsible for the debt. These people are usually the 'working poor'.

¹³⁴ Ibid.

¹³⁵ Protocol above n 113, [3.1] and [3.2] outline the principles of prioritisation.

She identified the provision in the National Protocol in relation to family violence and explained:

More specifically, it is victims of family violence who are at risk of further abuse if the alleged perpetrator is also self-represented. In these situations, the victim usually has a lawyer, so I offer to assist the perpetrator. I know that some people might think that, in the interests of fairness, both parties should be represented. But that isn't going to happen in the current funding climate. By helping the perpetrator, I try to act as a barrier so they can't personally talk to or get near the victim. I negotiate on their behalf with the other party's lawyer and think that assistance important as the perpetrator is often too emotionally involved to engage meaningfully in negotiations which personally affect them.¹³⁶

(iv) What type of assistance do most SRLs ask the duty lawyer to provide?

To understand the nature of the work duty lawyers do and what assistance SRLs might need, they were asked the nature of the help most SRLs wanted. The duty lawyers agreed that, by far, the greatest need was for procedural advice.

The researcher and the Launceston duty lawyer acknowledged that some SRLs wanted help to fill out forms and asked what they should put in affidavits. They gave consideration to the question whether SRLs and the court system would benefit if the duty lawyer helped SRLs with their documents before they filed in court. The researcher said:

I can't tell you how many times I have heard SRLs say to a judge who asks them what orders they are seeking, 'I just want to see my kids' and the judge says that the court needs more than that, in an application, with an accompanying affidavit, all of which the SRL needs to 'make, file and serve'. The look on an SRL's face is priceless. Their confusion is understandable — the language is arcane.

¹³⁶ Chapter IV: Part III: D: Stakeholders 32, 27, 21, 12 and 16; *Protocol*, above n 113, [3.3] provides that 'The decision of the duty lawyer in relation to the application of the principles of prioritisation, as outlined in clause [3.1], and the level of assistance provided under this Protocol will be final'.

(v) Referrals to other services

While SRLs may not often appreciate or ask for non-legal options, the researcher and the Launceston duty lawyer said they considered one of the main purposes of their role is to refer SRLs to other services if they required alternative or additional support. The researcher said:

People sometimes think of mediation as 'one step back' and worry that if they reach an agreement, the other party might not stick to it. I then explain that, if their matter settles at mediation, I can help them do Consent Orders. People often don't know all the options open to them. Not everything should go to court.

The Launceston duty lawyer explained the nature of her advice was to give people settlement options:

Because it gives (SRLs) the opportunity ... because I mean some people might not have thought of other avenues of settlement. I mean just because they may have had a mediation, they might not have had a Legal Aid mediation, they might not have tried a different organisation, I mean, you know, it could be a number of things they've not considered.

4.3 RQ3: What is the impact of the scheme on SRLs and other key participants in the family law system?

This research question was central to understanding how the duty lawyers saw the Scheme working and what contribution they thought it was making to the family law system. The question was not directly put to the lawyers. Instead, they were asked to comment on aspects of their role and how they thought the Scheme affected people who came into contact with it. Their responses provided insight into the workings of the Scheme and suggestions for changes to improve the service. This aspect is discussed further in Chapter VI dealing with recommendations for reform.

(i) What is the impact of the Scheme on judges?

When asked whether her intervention alleviated stress on the judge, the Launceston duty lawyer said:

[Judge X] is always very appreciative when I do ... the other day there were people struggling and ... I hadn't obviously got them beforehand, it looked quite complicated and I stood up and [the judge said], 'I can see the duty lawyer standing up behind you ... Would you like to talk to her? I will stand it down'.

The Launceston duty lawyer agreed with the proposition put to her by the researcher that in order to assist a judge to move matters along in a busy duty list when an SRL was taking up too much time and the judge and her colleagues getting frustrated, she brought herself to the attention of the judge by jumping up 'like a jack-in-the-box' to offer her services to the court:

Yes, I'm like that!

(ii) What is the impact of the scheme on the court system?

The Launceston duty lawyer agreed with the proposition that the intervention with an SRL alleviated the stress on court and registry staff who might be asked for legal advice:

Yes, exactly ... [the staff says] 'But we do have a duty lawyer'.

In response to a question about whether matters take less time with a duty lawyer she said:

Yes, I think mainly, yes, because you can jump up — people that want you to talk for them.

(iii) What is the impact of the scheme on court staff?

The researcher and the Launceston duty lawyer acknowledged that a good relationship between the duty lawyer and court staff was important. The duty lawyers were conscious that their role took pressure off court staff who were often asked for advice by SRLs. The Launceston duty lawyer said:

They will always come in and I can see court staff ... walking across with a look on their face [which says] 'I've got this 'problem person', and I usually say, 'I've just got a matter of my own and I will be with you in a minute, and they're always appreciative.

The researcher values the close relationships with court and registry staff, and other family law practitioners and considered such relationships improved the delivery of the duty lawyer service and were possible because Tasmania was a small jurisdiction:

On duty list days, if somebody has gone to the registry and court staff think they need help, the staff actually bring the SRL up into the court area and seek me out — and introduce me to the SRL — and then go back to their job. They go out of their way to help people.

(iv) What is the impact of the scheme on the other party's lawyer?

When asked whether helping with negotiations alleviates stress for fellow practitioners, particularly the ICLs, the Launceston duty lawyer agreed. She commented that she considered that her intervention also alleviated stress on ICLs who were often the only lawyers in a matter:

I must admit I always find the ICL. I guess they're used to almost dealing with the other party as well because they're in the middle anyway...I probably find more with our ICLs that they're more happy to do it themselves, talk directly [to the SRLs].

(v) What is the impact of the Scheme on SRLs themselves?

In response to the question whether SRLs were affected by having to appear unrepresented, the Launceston duty lawyer said:

Yes, absolutely. Some of them are very stressed. ... they've been through a lot before they've had ... even a trial.

She agreed with the proposition that the intervention of the duty lawyer in negotiations with the other party or the ICL took the stress off the SRL and improved settlement prospects. The researcher said:

they have told me that they feel more comfortable having seen me beforehand and knowing that I have some background in their matter when they go to court. It takes a lot of stress away from them. ... I can ... explain the situation to the lawyer on the other side and the judge. This takes the burden from SRLs of having to deal with the unfamiliarity of the court.

The Launceston duty lawyer agreed that her intervention in negotiations also promoted opportunities for settlement 'most of the time'.

When asked whether she gave as much time as was required to an SRL:

Definitely. ... one that I sat with [in court] all day ... was very happy.

(vi) What is the best/worst thing about being a duty lawyer?

In response to the question asking her to describe one of the best things about being a duty lawyer, the Launceston duty lawyer said:

[I]t's rewarding, I guess when you can help people ... And also when the judges appreciate it, that's quite satisfying.

The researcher also loves everything about her job. The researcher and the Launceston duty lawyer felt the worst thing was realising how little SRLs knew about the legal system, how many problems people had, and how incapable most of them appeared of handling their problems. This meant that the duty lawyers often thought 'where do I start' when considering the type of advice or assistance they could provide.

(vii) What is the impact of the Scheme on the duty lawyer?

This question was put to the duty lawyers in the context of whether they did any work other than that of the duty lawyer, to assess its impact on their role. When asked whether there would be less impact if the duty lawyer practice was exclusive rather than combined with other legal aid work, the Launceston duty lawyer said:

Definitely. ... I've always felt that I've neglected my duty lawyer stuff a bit ... When I had loads of files of my own, that was stressful.

In response to how she balances the duty lawyer role and her other work:

[N]ormally, I just do the call overs¹³⁷ ... [But when asked to do a matter outside of that list]... I was there all day ... it was one of those matters that grew legs as the day went on and it was quite complicated, and it sort of reminded me why I've sort of developed the practice that I have.

[I] could spend more time with self-represented litigants if I didn't have my ... main house practice, definitely.

Asked how much time she gave to duty lawyer work, she calculated that the percentage was ten, versus 90 per cent family lawyer case work:¹³⁸

It's more of just a balancing the file loads now.... I also do the divorce lists and I get a lot of work through them because a lot of people are unrepresented.

Having worked as a duty lawyer while also carrying in-house files, the researcher compared that with her experience of performing only the duty lawyer role:¹³⁹

When I was working in the Family Law Section, I felt conflicted about how much time to devote to the duty lawyer work because I was conscious of the commitments to my in-house clients. ... now. ... [e]ven on a busy duty list day, I can devote all my time to delivering the duty lawyer service.

People who lose their legal aid become my 'new' SRLs. I do a better job now because my time and role are dedicated to providing the duty lawyer service without ... having multiple interests.¹⁴⁰

¹³⁷ The term 'call over' refers to the court's duty list which is the first return date for applications made in the FCC. It is used in quotations which are verbatim. The term 'duty lawyer' is the term used throughout this study.

¹³⁸ At the inception of the Scheme, LACT was funded for two positions at 0.5 FTE (2.5 days per week each), which represents 50% of a practitioner's work load.

¹³⁹ The researcher was involved in both roles from March 2005 to March 2012. The dedicated duty lawyer role commenced in March 2012.

¹⁴⁰ This practice changed during the course of the study. Judges in Hobart and Launceston indicated they required not only clients to attend court on the day their matter was listed, but the practitioner who carried the file. This was to provide opportunities for solicitors and clients to negotiate towards settlement or identify to the court how the matter should proceed.

4.4 RQ4: What improvements could be made to the Scheme to better deliver the duty lawyer service?

(i) Extended duty lawyer time

When it was put to her whether it would be an advantage for the SRL to be able to make appointments to see the duty lawyer before their matter came to court, the Launceston duty lawyer said:

Yes. It allows you ... to be more proactive in seeking them out ... I would probably touch base with the court a bit before the call over ... suss out what's going to happen, ... then you at least know them and what we're doing a bit ... You can say, 'Oh, yep, I saw you last week. Let's go. We know what we're doing a bit', and then maybe limited follow up.

In response to whether having a dedicated day to deal exclusively with duty lawyer matters would be of benefit, the Launceston duty lawyer said:

Yes. [Judge X] doesn't sit every week, so you could get your list and go over on a Thursday or whatever ... like they do with the info session, have a pre-call over duty list. ... I think that would be good.

(ii) Dedicated role as duty lawyer

The Launceston duty lawyer agreed that the perfect model would mean being exclusively the duty lawyer without carriage of any other matters:

I've always felt almost guilty because ... I do probably give priority to my in-house files ... but ... you could almost set aside a day, which is still hard when you get conferences and things factored in to say, 'This is my duty day' ... if I didn't have a file load or anything ... that's how I'd do it.

When asked whether the duty lawyer could be a discrete job in itself she said yes. The researcher's view is:

There is no comparison between the level of service I now provide SRLs and when I had my own clients or took briefs from in-house practitioners ... I think that I do a better job now because my time and role are dedicated to providing the duty lawyer service.

(iii) Technical support

Data gathered from the duty lawyers raised the difficulties they experienced by not having a computer or access to the internet in their offices at the court. said the researcher and the Launceston duty lawyer said that without these resources, they could not conduct online research in relation to referring SRLs to other services. Furthermore, if the duty lawyer assisted with the preparation of documents, it was in hard copy, written out by hand. Similarly, if the duty lawyer was involved in negotiations and the matter was settled, Consent Orders were hand-written — a time consuming and inefficient process. The researcher's view is that it would be so much better if the duty lawyers' offices [had the] resources which would help us to our job more efficiently.¹⁴¹

Both lawyers considered that a fully functional office with a computer, printer and photocopier would improve service delivery and assist SRLs.¹⁴²

(iv) Summary

The researcher and the Launceston duty lawyer considered that their service provides valuable assistance to vulnerable people while also assisting in the efficient and effective progress of matters through the family law system. They

¹⁴¹ See *Protocol*, above n 113, [8] Infrastructure and [8.1] which outlines that one of the services the court will provide to the duty lawyer is access to a photocopier. Also see Chapter VI: Conclusions and Recommendations where the Director, LACT has agreed to fully resource the court offices of the Launceston and Hobart duty lawyers.

¹⁴² See Chapter IV: Part II: C, the impact of action research on the study, 3 (g) the researcher's presentation to the Family Consultants of the FCA and FCC, where the Family Consultants said it would be helpful if the duty lawyer could assist SRLs drafting Consent Orders after a successful mediation. Also see Chapter IV: Part I: B.I.B: Interview: Judge 3, who recognised that the duty lawyer needs access to the internet, photocopying and printing; *Protocol*, above n 113, [8.1] notes under Infrastructure that 'The court will endeavour to provide ... a room ... with adequate signage, lockable door, desk or workstation, lockable filing cabinet, internet access, telephone and duress alarms, and access to a photocopier and facsimile machine'. Although it is acknowledged and appreciated that the court allows the duty lawyers in Hobart and Launceston to use the Registry's photocopier, this usually involves asking a court officer to photocopy documents, which may be inconvenient and distract them from their own work. At [8.2], the Protocol notes that the Legal Aid Commission will supply computers and printers for the room, as necessary. These facilities were not made available to the duty lawyers at the commencement of the Scheme. In about March 2016, the duty lawyers requested LACT management to provide these resources and this was agreed. The computers were installed in both Hobart and Launceston offices in September 2016.

help divert people from the court system by giving advice about the merits of a person's case and referring people to alternative service providers.

They thought that the service has made significant inroads into providing access to justice for, and meeting the needs of, SRLs. Their comments indicate that the purpose and direction of the delivery of the duty lawyer service is well targeted to people who may not be eligible for legal aid. They feel that in a small jurisdiction where people have multiple problems, it is appropriate that they provide services to SRLs on more than one occasion.

The researcher and the Launceston duty lawyer acknowledge that the Scheme could be better publicised. However, the Launceston duty lawyer also noted that greater use of the service would put stress on her file load. She agreed that there were benefits if the role was defined and she did not have carriage of in-house files.

The researcher and the Launceston duty lawyer see scope and demand for an extended service to allow more time and flexibility to cater for the needs of SRLs at different stages of family court proceedings. By creating a different model than the one followed by the Launceston duty lawyer, it is considered that the system could deliver a better, more consistent and efficient service to SRLs and the court.

C Part II: The impact of action research on the study: chronological account of the changes made to the Scheme and the reasons why they were made

Part I of this Chapter dealt with the results of the empirical research which commenced in May 2013 with the survey of SRLs, the findings from the interview of the judges and the Launceston duty lawyer, and the comments of the researcher as the Hobart duty lawyer. Part II is an action research report, the chronological account of the changes made to the Scheme as a result of the research process and an explanation of why those changes were made. The report explains the gap in the research timetable between conducting the first part of the empirical research and the final part, which was the collection of data from court staff and family law practitioners in Tasmania who participated in a stakeholder survey conducted from 3 to 17 August 2015 (reported in Part III).

This part of the chapter describes the real-time context in which the research was conducted as part of an action research study.¹⁴³ Based on the data from the interviews, surveys and personal reflections, potential improvements to the Scheme were identified. Following data analysis and reflection at different stages of the research, conclusions were drawn about what could be changed. On each occasion that a change was made, it was examined closely and further changes made to enhance the Scheme.¹⁴⁴ This has been described as ‘cycles within cycles ... [which] extend across an entire study’.¹⁴⁵ In this case, the process commenced in early 2013 and continued to August 2015¹⁴⁶ when the stakeholder survey was conducted.¹⁴⁷

For these reasons, the action and research outcomes are presented prior to the later stage of the study as it was judged that the main changes had been implemented in the two-year period between the initial gathering of data from

¹⁴³ Julianne E Meyer, ‘New Paradigm Research in Practice: The Trials and Tribulations of Action Research’ (1993) 18(7) *Journal of Advanced Nursing* 1066.

¹⁴⁴ David Coglán and Teresa Brannick, *Doing Action Research in Your Own Organisation* (Sage, 4th ed, 2014), 79.

¹⁴⁵ Dick, above n 5, 17.

¹⁴⁶ During this time, the researcher also suspended the study on two occasions, from 1 August to 1 November 2013 and again from 1 January to 30 September 2015, to accommodate her teaching commitments.

¹⁴⁷ The stakeholder survey was conducted from 3 to 17 August 2015.

SRLs, judges and duty lawyers and gathering data from court staff and family lawyers (collectively called stakeholders).

One of the aims of this study was to identify opportunities to make changes which would better deliver the duty lawyer service. The researcher's use of the action research approach as one of a suite of research techniques was discussed in Chapter III.¹⁴⁸

1 March 2005: Commencement of the Scheme

When the Scheme was launched, there was no campaign by LACT to make people aware of its existence or to explain what the duty lawyer could do for SRLs. The LACT website had a brief note about the service but did not elaborate on its functions or its availability. No brochures or information sheets were produced to be disseminated to the courts, Family Relationships Centres or other agencies where SRLs might seek assistance. Whether this was a funding or a management issue, no brochure was produced until June 2014, under a new Director.

The researcher in Hobart and the duty lawyer in Launceston operated under the principles of a draft National Protocol which was not finalised until 2007.¹⁴⁹ There was no training provided, so in practice the approach adopted was based on the individual duty lawyers' own experience, professional judgment and understanding of the Scheme. Although the funding for the position was for two and a half days per week (0.5FTE), there was no way of knowing how much time was involved in delivering the duty lawyer service. Nor was there a requirement to time record. In analysing data from the interview of duty lawyers, it is clear that it was difficult to balance the tension created by performing two jobs.

At an external level, in her discussions with participants in the family law system, the researcher gained a perception that the Scheme was not widely known, might have had better ways of operating, and was probably not reaching

¹⁴⁸ See Chapter III: F.3.2. Changes made to the Scheme as a result of action research.

¹⁴⁹ *Protocol*, above n 113.

many of the people needing assistance. However, the pressures on the duty lawyers left little time to reflect on what could be done differently, let alone take action to change the system.

2 March 2012: Commencement of research

Upon the commencement of full-time study, the researcher changed her employment status to 0.2FTE, nominally eight hours per week. She no longer had carriage of in-house files and performed the role of duty lawyer only. She continued to attend the clinic sessions each Monday.¹⁵⁰ She recorded her attendance as duty lawyer statistics, but there was no requirement for the other two lawyers from LACT's Advice and Community Education ('ACE') section who attended clinic to record their attendances. Many people attended clinic on more than one occasion.

As the researcher became more immersed in her study, she formed a view that the Monday clinic session could be better organised, targeted towards meeting the needs of SRLs who attended court on a non-sitting day. The researcher thought that the other lawyers were providing legal advice which could be recorded as duty lawyer data to monitor the delivery of the service. It was often the case that these lawyers brought their 'client' to the attention of the duty lawyer, who would attend to them when their matter was next in court. The fact that lawyers were not recording attendances undersold the services provided at the clinic.

Reduced hours allowed the researcher time to reflect on her own practice, and to consider what she thought ought to change about the Scheme. She benefited from the knowledge gained from her review of the literature relating to the introduction of the Scheme and, in particular, from looking at other models of delivering duty lawyer service.¹⁵¹

¹⁵⁰ See Chapter IV: Part I: B.I.C where the researcher reduced her hours of work from the full time equivalent (FTE) of two and a half days per week (0.5 FTE) to one day per week (0.2 FTE).

¹⁵¹ Forell and Cain, above n 82; Don Clairmont and Ian Joyce, *The Summary Advice Counsel Initiative: Assessing its implementation, Impact and Future Directions in Two Nova Scotia*

It was always anticipated that change would be a likely by-product of the research. As the data revealed problems or issues with the Scheme, the researcher responded to bring about changes. The action research method allowed her to be responsive and flexible, with time for reflection after each stage of the data gathering process.¹⁵²

(i) May–June 2013: Survey of SRLs

The survey of SRLs was conducted from 13 May to 28 June 2013. Analysis of the data from this revealed that the majority of respondents knew little about the Scheme or the services a duty lawyer could provide.¹⁵³ It was clear that there was a need to provide more information about the Scheme, and to extend the time of, and change the structure of, the Monday clinic sessions at the court.

(ii) June 2013: Introduction of ‘triage’ to Monday clinic

In mid-2013, the researcher prepared an informal proposal to LACT management that the clinic sessions be conducted on the triage model of the EIU and offer extended services to SRLs by assisting with drafting documents. This system was put in place in late 2013.

The benefits of triage legal services have been recognised as part of an intensive and efficient way of assessing a person’s problem.¹⁵⁴ The clinic sessions at the court are a particularly useful and important part of this, as the court is usually the first place a person attends to get legal advice.¹⁵⁵

The first initiative involved the researcher and the two other lawyers from ACE recording their attendances as duty lawyer services on reporting forms created

Urban Area (Report Submitted to Court Services Division, Nova Scotia Department of Justice, July 17, 2006); Farrow et al, above n 126.

¹⁵² Coglan and Brannick, above n 144, 79. This sequence of events has been described as cycles of gathering data, analysing, planning action and taking action.

¹⁵³ See Table 4; only 10 of 30 of people attending court or accessing services knew about the duty lawyer service compared with 17 of 30 who did not know.

¹⁵⁴ Forell and Cain, above n 82.

¹⁵⁵ Responses from court staff in the stakeholder survey showed that it was ‘very important’ that they have a good relationship with the duty lawyer; see Table 40. This finding was supported by the significant number of referrals from court staff to the duty lawyer: Figures 3 and 4. The majority of SRLs who completed the survey said they found out about the duty lawyer service from court staff; see Figure 4.

by LACT, mirroring those used by the criminal law duty lawyers, which record a person's full details of the matter in dispute and could be used for conducting conflict checks.¹⁵⁶

The General Manager of the FCA and FCC in Hobart agreed to the researcher's request that, as people normally came to the registry as their first point of contact, registry staff provide SRLs with forms to fill out while waiting to attend the Monday clinic. The form provided the usual contact details but also a summary of the problem and indication of if and when the matter was in court. People were given a number according to when they arrived. Court staff's cooperation in this venture was invaluable, and was an improvement on the previous system which had people congregated in the foyer in no order of attendance or urgency: when the clinic lawyers attended at 1.00pm, they accepted people's account of who had arrived first — and people who had attended the clinic previously knew to arrive early, outmanoeuvring those who were new.

This was an issue taken up by the researcher in the restructuring of the clinic service. Under the new arrangements, the duty lawyer attends the court prior to 1.00pm and conducts a triage, prioritising whoever has proceedings in court.¹⁵⁷ She notes that every person has a number but indicates that new people with urgent matters will be dealt with first. She attends to them and indicates to the others that the LACT lawyers will deal first with people who have not attended the clinic previously in order of their number and then, if there is time, with people who have attended on more than one occasion.¹⁵⁸ This ensures fairness

¹⁵⁶ The potential for conflict was an important issue for LACT in a small family law jurisdiction. LACT needed to record details to ensure that problems did not arise from duty lawyer attendances at this clinic session causing disadvantage to people later applying for legal aid and solicitors acting on their behalf seeking to restrain a LACT solicitor from acting on the other side. LACT lawyers are aware of their ethical duties and take seriously the need to create 'information barriers' to address any conflict of interest issues in order to maximise the flexibility and use of in-house lawyers rather than referring matters to the private profession.

¹⁵⁷ Forell and Cain, above n 82. EIU duty lawyers refer to the benefit of performing 'triage', an early assessment of an SRL's dispute which allows the duty lawyer to prioritise according to the urgency of the matter.

¹⁵⁸ The intention is that the clinic services not become a means by which people achieve or think they have continuous representation.

and equity, and the system is not abused by people seeing it as an open-ended and continuous service.

The duty lawyer deals with high-needs clients who have complex matters, and tailors assistance accordingly. The matters addressed include: multiple respondents in children's matters; property matters where the pool is insignificant and parties are ineligible for legal aid but cannot afford a lawyer; urgent recovery or relocation matters; where the parties have significant ongoing medical and/or psychological issues; where there are significant cultural issues with competing interests; where there are allegations of family violence; where an SRL is in the process of preparing material for trial and requires assistance sorting it out; as well as an understanding of the rules of evidence, relevance, and the art of examination in chief and cross-examination.

(a) *Extension of clinic time*

The duty lawyer extended her attendance time to stay at the clinic until 3.00pm or as long as required.¹⁵⁹ This was possible as she exercised considerable autonomy in her work: her conditions of employment were that she works one day per week. As duty lists in the FCC only occurred once per month, she ensured that she appeared on the two days of each duty list and a further day in Legal Aid to record attendances. The remainder of the time was amortised to total one day per week. This allowed flexibility to extend the clinic time in response to the needs and demands of SRLs on that day.

The time for each person attending the clinic is determined by the nature of their matter and not driven by time recording, so a duty lawyer gets sufficient information and an understanding of a matter *before* seeing a person as an SRL in court. This gives a stronger sense of the service being an early intervention strategy. Changing the way of assessing clients' needs early ensures that the duty lawyer's focus is on providing specialised and intensive service to people who need it most urgently. Having extended time allows the duty lawyer to become familiar with a person's story and, when their matter came before the

¹⁵⁹ The LACT lawyers return to their work at 2.00pm.

court, to better represent the person. There are also significant emotional benefits for SRLs who attend their court event knowing that the duty lawyer is expecting them and already knows who they are and what their matter is about.

It is also a more efficient use of the duty lawyer, who can anticipate the workload of each day. This is particularly important as the duty lawyer conducts the clinic session during the FCC duty lists. On that day, the service provides a number of critical functions. The duty lawyer may use the court's lunch break to attend to SRLs whose matter is in court on that day, as in a busy duty list¹⁶⁰ there may not have been time or opportunity to speak with every SRL requiring assistance in the morning session. If SRLs appear and their matter is stood down until the afternoon, the duty lawyer can provide advice about what the SRLs can expect to happen, assist with making simple amendments to documents, or direct SRLs to the registry to get necessary forms and to fill them.¹⁶¹

While an SRL's consultation with the duty lawyer in the Monday clinic sessions is not constrained by time,¹⁶² on duty list days the duty lawyer deals as efficiently as possible with SRLs. This is possible because she receives the support of the court and family law practitioners on that day; it is one of the advantages of working in a small jurisdiction. In the event that an SRL does not have their documents,¹⁶³ court staff will supply the file. Similarly, the other party's lawyer will brief the duty lawyer on what is before the court on the day and allow her to access their file or make copies of relevant documents. These co-operative professional arrangements make it easier for a duty lawyer to quickly come to an understanding of the matter before the court, and it is

¹⁶⁰ The monthly duty lists of the FCC routinely have more than forty matters. The morning session is dedicated to short matters requiring a mention. The judge conducts Directions Hearings from 2.15pm and matters requiring a short hearing at 4.00pm.

¹⁶¹ This is often the case with SRLs who need to file a Notice of Address for Service or responding documentation.

¹⁶² The two LACT lawyers conduct clinic advice sessions in the normal manner. If they see a person who is in court on that day, they usually refer them to the duty lawyer or, if the duty lawyer is occupied, draw her attention to the need to see the person when time permits. The relationship between the duty lawyer and the two LACT practitioners is close, cooperative and respectful, and works well to balance the needs of SRLs and the constraints of the clinic model.

¹⁶³ It is more common than not that SRLs arrive in court without any documents, whether they are Applicant or Respondent, or with bags full of documents in no particular order.

interesting that all respondents to the stakeholders' survey said that a good relationship with the duty lawyer was important to them.¹⁶⁴ One judge had noticed that the other party's lawyer refer SRLs to the duty lawyer more often 'because they know it's going to make it easier for them ... because they'll have somebody that they can ... talk to on equal terms'.¹⁶⁵

There are recognised efficiencies for the courts if a duty lawyer represents an SRL: the matter gets before the judge quickly and can either be disposed of or stood down to allow the duty lawyer to negotiate with the other party's lawyer.¹⁶⁶ Negotiations involving the duty lawyer progress better and often result in the SRL being given settlement options or, often, an interim agreement. This outcome was acknowledged by another judge during the interview.¹⁶⁷ Court staff commented that when they were presented with incorrectly filled out forms or badly drafted orders, they happily referred the SRL to the duty lawyer.¹⁶⁸ Family lawyers felt that if SRLs could see the duty lawyer before starting proceedings 'which is to some degree available through the clinic at the court, though capacity is currently limited', this might result in their seeking 'sensible orders and help ensure that family violence and/or risk of child abuse is detected and flagged',¹⁶⁹ that proper referrals are made and that there is the necessary evidence to support the Orders'.¹⁷⁰ This strongly suggests that the duty lawyer needs more time with an SRL to provide this level of service.

It is not possible to qualitatively evaluate, in terms of outcomes, the assistance that these measures bring to SRLs and other participants in the family law system.¹⁷¹ The specific targeting of urgent matters, the flexibility and extension

¹⁶⁴ See Chapter IV: Part III: D: Stakeholder responses to Question 24: see Table 40.

¹⁶⁵ Chapter IV: Part I: B.I.B: Interview: Judge 1.

¹⁶⁶ Forell and Cain, above n 82.

¹⁶⁷ Chapter IV: Part I: B.I.B: Interview: Judge 3.

¹⁶⁸ Chapter IV: Part III: D: Stakeholder 25.

¹⁶⁹ See Chapter IV: Part I: B.I.B: Interview: Judge 2, who said one of the advantages of the duty lawyer appearing is that the court is alerted to issues concerning family violence and risk: 'Warning a court where you'll stand up and say, "This is a matter where there are serious issues of violence, your Honour", even though there's nothing you can do about it, it will have the court at least being alerted to that'.

¹⁷⁰ Chapter IV: Part III: D: Stakeholder 25.

¹⁷¹ Productivity Commission, above n 12, vol 1. The report acknowledged that it was difficult to measure outcomes for SRLs for services provided by duty lawyer and self-representation services.

of the duty lawyer services and the emotional benefits to an SRL of meeting the duty lawyer prior to appearing in court and having confidence that she has knowledge of their matter are systems that were put in place to improve the effectiveness of the Scheme. It is acknowledged that they cannot be used to measure precisely the extent to which the service improves access to justice for SRLs, but it is considered that they offer improvements consistent with literature and practice which support a holistic approach to helping SRLs.¹⁷² This approach is described in the recent LAW survey as a 'joined up' approach that is client focused rather than problem focused,¹⁷³ and is supported by the Productivity Commission's emphasis on doing away with duplication in favour of 'an integrated and collaborative service delivery'.¹⁷⁴

3 Access to justice - raising awareness

The SRL data showed there was scope to improve awareness of the Scheme. This has implications for access to justice; the Scheme was not widely known about or used.¹⁷⁵ The researcher noted that the evaluation study of the EIU commented that SRLs often 'just don't know where to start to find ... help'.¹⁷⁶

(a) August – November 2013: Raising awareness

The duty lawyer in Launceston was asked how the service was brought to the attention of SRLs. She described a 'teeny weeny sign ... beyond the toilets' but

¹⁷² Forell and Cain, above n 82; Productivity Commission, above n 12, vol 1; also see Chapter IV B.I.A: 4.4 (ii) Table 4, Question 6 asked SRLs whether they knew about duty lawyer services.

¹⁷³ Coumarelos et al 2012, above n 10; Productivity Commission, above n 12, vol 1. The report recommends a holistic approach to justice; also see Chapter II: B. 3, 4 and 5 where this is discussed in greater detail.

¹⁷⁴ Productivity Commission, above n 12, vol 1, 178.

¹⁷⁵ Attempts to raise awareness through producing and distributing a brochure are discussed in Section C: 3 (g) and (h); Also see Clairmont and Joyce, above n 151. This study of the Summary Advice Counsel (duty lawyer) service in family law matters conducted interviews of SRLs and other participants who used the SAC (duty lawyer service) in Nova Scotia found that the level of awareness about the duty counsel scheme was low and could be improved. Moreover, community agencies who came into contact with SRLs also said they needed to know more about the SAC services. The report concluded that 'equity concerns would appear to require more promotion of the SAC service', 106.

¹⁷⁶ Forell and Cain, above n 82. Also see Chapter II: C 2 for discussion on the EIU.

did not think anyone actually saw it or took notice.¹⁷⁷ She was keen that the service be better advertised.¹⁷⁸

The usual practice of anyone coming into the Commonwealth Law Courts for a family law matter is that they go straight to the registry or upstairs to the courts. In Hobart, a small typed notice that a duty lawyer is available is pinned on the main board which holds the court listings. It does not say when or where the duty lawyer can be found, so it is very easy *not* to know about or to find the duty lawyer.

Anecdotal evidence suggests that the majority of referrals came from court staff, although there was no requirement that they refer SRLs to the duty lawyer; those staff who did so were often repeating the same referral message. The researcher thought that a request from the judiciary that court staff refer SRLs to the duty lawyer would achieve a better outcome than this informal arrangement. In response to the question whether it would be possible for court staff to directly refer SRLs to the duty lawyer, one judge said that ‘the counter staff need to do it ... I can’t see how it could be done any other way’. The judge suggested the words registry staff could use:

Look, that document won’t pass muster. You know you need to smarten this up, or look, you may find it to your advantage to go and see ... the duty lawyer ... and get some preliminary advice ... You may find it helpful to do so.¹⁷⁹

Soon after this interview, registry staff told the researcher that they had been asked by the judge to refer people to the duty lawyer. They were happy to do so as it took pressure off them. It was not surprising to see similar comments in the stakeholder survey conducted in late 2015.¹⁸⁰

While being mindful of the demands on the judge’s associate and court clerk on duty list days, the researcher in her role as the duty lawyer asked the judges if they would agree that court staff make an announcement that a duty lawyer is

¹⁷⁷ Chapter IV: Part I: B.I.C: Interview: LDL.

¹⁷⁸ Ibid.

¹⁷⁹ Chapter IV: Part I: B.I.B, Interview: Judge 1.

¹⁸⁰ The survey period was from 3–17 August 2015.

available *before* the commencement of the duty list. The quick understanding and offer of assistance from the judges was most encouraging and helpful. The same judge who quickly dealt with the issue of the sign not only agreed that the associate make an announcement, but added:

At the beginning of the duty list I could ... let self-represented litigants know there is a duty lawyer available here if you need any assistance ... it's not my job, but I'm happy to help. If it meant that's going to help them, it's going to help me; it's going to help everyone isn't it?¹⁸¹

Announcements were duly made by the judge's associate from December 2013. They continue to be made on a regular basis, depending upon the workload of the associate. In the event that the associate has not had the opportunity to ask, the judge *always* asks SRLs whether they would like to see the duty lawyer.

These measures have improved the duty lawyer's ability to reach SRLs early in the court's proceedings. The fact that the judge asks SRLs whether they would like the duty lawyer to help them has made *everyone* in the family court system more aware of the services provided by the duty lawyer. The judge in question often asked the lawyer on the other side of an SRL's matter if he or she had introduced the SRL to the duty lawyer and, if not, would stand the matter down to allow that to occur; this resulted in more practitioners approaching the duty lawyer before the matter came into court. These initiatives highlight how cooperative arrangements can be put in place quickly in small jurisdictions where there are close and respectful relationships.

Having received offers of support from the judges, the duty lawyer consulted with the Registry Manager, the Team Leader and the Facilities Manager of the court in Hobart to reword the signs and decide where they would be of most use. Within weeks, several large signs with prominent red writing appeared conspicuously at the security checking station at the entrance of the court, the registry, on walls outside the courts next to the court list, above the water cooler

¹⁸¹ Chapter IV: Part I: B.I.B: Interview: Judge 3.

and near the toilets, as well as on the duty lawyer's office. Similar initiatives were undertaken in the Launceston court.

Although the signs have improved the visibility of the service, people representing themselves in the family courts are often stressed; they may, in addition, have learning disabilities.¹⁸² If they did not already know about the duty lawyer, they may not understand the reference to it in a sign. Registry staff have told the researcher that they are happy to tell SRLs about the duty lawyer, adding that, on a duty list day, people now come to the registry and refer to the sign. Staff provide a brief overview of what the duty lawyer does and direct them to the duty lawyer's office. It is not unusual for staff to accompany SRLs to the foyer of the court and actively seek out the duty lawyer. These comments and activities reflect the large number of referrals made by court staff and echo the positive responses from court staff in the stakeholder survey.¹⁸³ They also confirm the responses of SRLs, the majority of who said that they were referred to the duty lawyer by court staff. After the introduction of the signs, court staff told the researcher that there was demand for the service beyond the duty list days.

(i) November 2013 – June 2014 Presentations

Throughout the study, the researcher was conscious that there may not be sufficient awareness of the duty lawyer service among the legal and non-legal professions. It was important that the researcher think about how to better communicate and educate people who came into contact with SRLs about the availability of the duty lawyer service.

From November 2013 to June 2014, the researcher made a number of presentations to agencies, groups and self-help service providers designed to inform them about how the Scheme could help SRLs who were moving beyond mediation and into litigation.¹⁸⁴ The researcher's hope was that the

¹⁸² Macfarlane, above n 28.

¹⁸³ Chapter IV: Part III: D: Comments: Stakeholder 21 'The Duty Lawyer provides assistance with the smooth running of the court, especially in duty lists'.

¹⁸⁴ 7 November 2013 – Presentation to the Family Law Pathways Network: Greater Hobart. The Australian Government funds Family Law Pathways Networks around Australia. Each

presentations would result in a greater number of referrals to the duty lawyer service and thereby help more SRLs who may not otherwise hear about it.

The most striking impression the researcher came away with was that many of the representatives of mediation and self-help agencies did not know about the Scheme. This was disturbing on a number of levels, but mainly because the participants were often the first professionals attending upon people who might go on to become SRLs in the family courts.¹⁸⁵ On the other hand, representatives said they found most helpful the suggestion from the researcher that they could refer SRLs to the duty lawyer for legal advice and information.

The legal professionals knew about the Scheme but were not clear about the services offered by the duty lawyer. This aspect was reflected in the results from the stakeholders, many of whom sought more information about what the duty lawyer could and could not do.¹⁸⁶ Therefore, although all stakeholders were aware of the service, they were not informed about the impact of the Scheme.

It became clear to the researcher that raising awareness through presentations was important and that the message about the Scheme also needed to be communicated through other mediums.

One of the consistent outcomes following each presentation was the demand for written information about the Scheme. It was a surprise to almost everyone who asked for a brochure that one was not available.

Network comprises professions operating within the family law system including representatives from the courts, the Child Support Agency, Community Legal Centres, Centrelink, family lawyers and other Family Law services providers. Pathways focus is on information-sharing and networking opportunities in a local area to develop and maintain cross-sector training to help build stronger working relationships across the family law system; 29 November 2013 – Presentation to the National Council of Single Mothers and their Children; December 2013 – Presentation to the Family Court, Hobart, Registry team members and Family Consultants; May 2014 – Presentation to the Independent Children's Lawyers Conference; May 2014 and June 2014 – Presentations to the annual conference of the Family Law Practitioners Association of Tasmania (FLPAT).

¹⁸⁵ Since the 2006 Amendments to the *Family Law Act 1975* (Cth), parties who have a dispute about children are required to attempt mediation prior to filing applications; see s60I Attending family dispute resolution before applying for a Part VII order.

¹⁸⁶ See Chapter IV, D: III: Comments: Stakeholder 25.

(ii) June 2014: Family Duty Lawyer Scheme: Brochure and Website.

The appointment of a new Director of LACT was made on 28 January 2014. The Director introduced a number of new initiatives and management systems designed to increase the LACT's efficiency. The researcher proposed that a brochure be produced, citing legal and non-legal professionals who had asked for more information,¹⁸⁷ findings from interviews with the judges and the duty lawyer in Launceston, and the results of her survey of SRLs.¹⁸⁸

This was approved. The brochure was produced in consultation with the Launceston duty lawyer and made available in mid-2014.¹⁸⁹ It was in simple language and listed the things the duty lawyer could and could not do for a person who had a matter in the family courts and was without a lawyer. More importantly, it provided details of the duty lawyers' location in Hobart, Launceston, Devonport and Burnie and the hours the service operated in those courts. It included contact details for LACT's offices in those locations, in the event a person wanted further details about the service. It also noted that 'you may be able to make an appointment with the Duty Lawyer at other times'. It was assumed that there may be more demand for the service beyond the existing allocation of time.

The duty lawyers distributed the brochure to the combined registry of the FCA and FCC in Hobart, Launceston, Devonport and Burnie, all Family Relationships Centres in Tasmania, Relationships Australia, Positive Solutions, Anglicare, Centacare, Hobart Community Legal Service, Launceston Community Legal Service, the North West Community Legal Centre in Devonport, the Women's Legal Service, the Migrant Resource Centre, Advocacy Tasmania, the Law Society of Tasmania and the Family Law Practitioners Association (Tas). The duty lawyer in Launceston took the opportunity offered by the publication of the brochure to make presentations on the Scheme to the Pathways Network in

¹⁸⁷ See Chapter IV: Part II: C Impact of action research on the study, 3 (g) November – December 2013 Presentations.

¹⁸⁸ Chapter IV: Part I: B.I.A: Figure 1 and Table 7 show that the majority of SRLs became aware of the Scheme from court staff and Legal Aid. No-one found out about it through a publication or website.

¹⁸⁹ See Chapter IV: Part II: C Impact of action research on the study, 3 (g) and (h) on Family Law Duty Lawyer Scheme: brochure and website.

Launceston and Northern Tasmania, the Launceston Community Legal Service, and other agencies who sought information.¹⁹⁰

Both duty lawyers continue to make presentations to agencies and organisations on request, as part of LACT's commitment to continuing a community legal information program.¹⁹¹ This is in line with findings in recent reports that Commissions need to offer 'legal information and community legal education to improve the knowledge and capacity of the community'.¹⁹² The development of a plan for education and information activities would significantly increase the effectiveness of duty lawyer resources in Tasmania and such a plan is addressed in Chapter VI.

After the production of the brochure, the Registry Manager confirmed her earlier commitment to instruct staff to attach a brochure to each form and DIY kit provided to SRLs, and requested 500 brochures. The Team Leader of the combined registry of the FCA and FCC in Hobart said there was high demand for the brochure from SRLs and the court staff was delighted that they could provide a brochure when referring SRLs to the duty lawyer. It was considered to be a successful initiative which was well overdue.¹⁹³

Another LACT initiative initiated around the time of discussions about the brochure was the revision of its 2003 website with expanded and updated information about the services offered.¹⁹⁴ The website, launched by the Tasmanian Attorney-General¹⁹⁵ on 12 August 2015, presents a great deal of information in 90 languages.¹⁹⁶ It has a section, 'Going to Court?', which sets

¹⁹⁰ The duty lawyer together with the Manager of the State-wide Family Law Practice presented on the duty lawyer service to the Launceston Community Legal Service on 1 October 2014.

¹⁹¹ LACT has information about the community legal education sessions on its website, including how to book an education session.

¹⁹² Productivity Commission, above n 12, vol 1; Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services*, Final Report (2014), 34 ('Allen Consulting').

¹⁹³ There were 1600 brochures provided for the Hobart registry, 1000 for Launceston and 200 each for of Burnie and Devonport. These numbers reflect the volume of enquiries by SRLs in those Family Court jurisdictions.

¹⁹⁴ The website had over 368,000 views each year (LACT Annual Report 2014–15).

¹⁹⁵ The Honourable Dr Vanessa Goodwin MLC launched the website at an event at the offices of LACT.

¹⁹⁶ The website uses graphics and YouTube videos. It contains fact sheets, self-help kits and animation. It is easy to use and was designed with Tasmanian users in mind.

out the services provided by LACT, including information about the availability of the family law duty lawyer on duty list days and the Monday clinic. It stresses that 'it is best to get legal advice before' going to court.¹⁹⁷ The information on the LACT's website generally is a marked improvement on what had been available previously, although in hindsight it might have been a better guide to the duty lawyer if the term 'self-represented litigant' had appeared as a heading under which a person could find information about the duty lawyer. The term is widely used and understood as legitimising the path for access to justice.¹⁹⁸ If this appeared on the website, it might direct more people to the Scheme.¹⁹⁹

(b) Duty lawyer statistics

To evaluate the changes made to the Scheme during the course of this research, it is necessary to look at the data on duty lawyer services delivered before and after the commencement of this study. In 2011, the year preceding the researcher commencing full-time research and reducing her working hours at LACT, the number of duty lawyer attendances in Hobart was 116.²⁰⁰ Prior to any changes being made to the delivery of the service in 2012–2013, 119 duty lawyer services were provided, 73 in Hobart and 46 in Launceston, Devonport and Burnie.²⁰¹ Since the changes to the Scheme, including extending hours and raising awareness, there has been a steady growth in the delivery of duty lawyer services in Hobart. In 2013–14, the number of services were double those of the previous year.²⁰²

The numbers continued to increase. In 2014-15, there were a total of 298 services, 247 provided by Hobart²⁰³ and 36 by Launceston, Devonport and

¹⁹⁷ This section can be found by navigating on the LACT home page, <<http://www.legalaid.tas.gov.au/need-help/going-to-court/>>

¹⁹⁸ Macfarlane, above n 28.

¹⁹⁹ This issue is discussed further in Chapter VI under recommendations.

²⁰⁰ Legal Aid Commission of Tasmania, *Annual Report 2011–2012* (2012). These statistics are recorded by financial year.

²⁰¹ Legal Aid Commission of Tasmania, *Annual Report 2012–2013* (2013).

²⁰² From 1 July 2013 to 30 June 2014, there were a total of 214 duty lawyer attendances, with 155 recorded in Hobart and 59 in Launceston, Devonport and Burnie.

²⁰³ The researcher recorded 81 attendances as duty lawyer. The other services were provided by legal aid lawyers at the Monday clinic session or, if the researcher was unavailable, by another family law practitioner. A local Hobart legal firm, Butler, McIntyre and Butler, provide duty lawyer services when LACT has a conflict. These services are not recorded.

Burnie. In 2015-16, Hobart recorded 282 services and Launceston, Devonport and Burnie recorded 105, totalling 387 duty lawyer services.

2 Current arrangements

The researcher's perception is that the challenges for a duty lawyer are greater when the lawyer has obligations to his or her own clients or takes briefs from in-house practitioners.²⁰⁴ Some important efforts by the duty lawyers have already begun to address these issues. The duty lawyers are committee members of FLPAT. At a recent meeting, private practitioners commented that they disapproved of the practice whereby LACT family law practitioners in Hobart were not attending the duty lists with their clients, preferring to brief the duty lawyer. Private practitioners noted for the record that judges of the FCC in Hobart and Launceston required practitioners and their clients to appear in the duty lists and use the opportunity to participate in meaningful negotiations. It was considered an impost on the duty lawyer to be engaged in negotiations on brief from in-house practitioners and detracted from the time they could spend on assisting SRLs.

The researcher raised these concerns with LACT management. As a result, LACT introduced a new policy that Legal Aid practitioners would appear on their own matters in the duty lists and that the duty lawyer would only be briefed in the event that the practitioner had an unavoidable or unchangeable event scheduled at the same time. This change in direction was communicated to the FLPAT Committee at the meeting on 8 June 2016 and was warmly received. The researcher's reflection after the FCC duty lists on 6 and 7 June 2016, the first since the introduction of the new policy, was that being relieved of in-house briefs, enabled her to offer extended time to SRLs.

²⁰⁴ This perception was reinforced by the experience of the duty lawyer in Launceston who commented on the tension this creates in her practice; see Chapter IV: Part I: B.I.C: Interview with LDL saying she felt 'guilty' only devoting 10% of her time to duty lawyer services and comparing Comments: researcher who said it was 'liberating' that she did not carry in-house files. This aspect was addressed by the EIU by separating the duty lawyer service from the in-house practice.

A second concern raised at FLPAT meetings was that reductions in legal aid funding had resulted in clients not being funded for their solicitor to appear for procedural matters in the duty lists. Private practitioners commented that as they already 'subsidised' Legal Aid by accepting a lower fee to assist legally aided clients, they might now no longer appear pro bono at court events. The researcher pointed out that this would result in a greater number of people appearing unrepresented and needing the duty lawyer's assistance, which is already stretched during FCC duty lists. She asked that family lawyers who knew a former client would be self-represented email her and the Launceston duty lawyer, to allow them to be proactive and search them out or, at least, be better prepared. The duty lawyer reminded private practitioners that attendance by the duty lawyer was at their discretion and according to availability. While the duty lawyers would make every effort to assist SRLs, if the numbers were too great some might not be able to receive assistance on the day.

The researcher, in her role as duty lawyer, raised this issue with Legal Aid management, and a directive was issued that LACT communicate to FLPAT that the duty lawyer service is not limitless and that the private profession should not look upon it as absolving them of their professional responsibility. It was made clear to FLPAT that if private practitioners were, and remained, on the court record as a client's legal representative, they should continue to appear. The duty lawyer would only assist when a person was unrepresented as a result of being ineligible for legal aid generally or genuinely unable to afford a lawyer.

The situation where private practitioners refuse to appear pro bono may be unusual, given the legal professions' long history of this kind of work.²⁰⁵ The concern for this study is its impact on the duty lawyer service. How to accommodate a greater number of SRLs is challenging, and reinforces the

²⁰⁵ National Pro Bono Resource Centre, *Fourth National Law Firm Pro Bono Survey: Australian Firms with Fifty or More Lawyers*, Final Report (December 2014). The Centre conducted interviews with more than 41 of the 55 firms with 50 or more FTE lawyers, including 24 of the 25 largest firms with direct involvement in pro bono work in family law. The research revealed that pro bono work was mainly undertaken by the top-tier firms as training and development for young practitioners; mid-size and smaller law firms found it difficult to sustain a program of pro bono work. However, the number of pro bono hours had doubled since the previous survey two years earlier.

need for new initiatives to deal with the growing numbers of SRLs in Tasmanian family courts, as recommended in Chapter VI.

4 Summary of action research report

The promotion of the Scheme and increasing referrals to the duty lawyer created a need which could not be met merely by an extension of the service offered in the Monday clinic. There was increased demand for the service during duty lists in Hobart, for both more time and extended services, which created stress as the researcher, in her role as duty lawyer, was constrained by time and by her responsibility to fulfil obligations to clients on whose matters she had been briefed by LACT in-house practitioners. In Launceston, the duty lawyer had to divide her attention between her duty lawyer role and her own clients.

The researcher was able to make changes to her practice as a result of being separate from the Family Law Section (LACT) and having the autonomy to try initiatives which have no resource implications for anyone except herself. As previously mentioned, as long as the commitment to appear in the duty list was maintained, the other hours of her work could be arranged to suit her practice. None of the changes made involved consulting LACT management at a policy level. The arrangement whereby court staff of the registries provided SRLs attending the Monday clinic with forms for their completion, and a number according to their time of attendance, was made in discussions between the duty lawyer and the Registry Manager, Hobart. New arrangements to improve SRLs' access to and knowledge about the duty lawyer in the Family Courts came as a result of the interviews with the judges.²⁰⁶ These changes were achievable without affecting LACT's financial and human resources. They made an immediate impact.²⁰⁷ However, rethinking the duty lawyer service to extend its service capacity, both in terms of increased duty lawyer time and expanded

²⁰⁶ See Chapter IV: Part I: B.I.B: Interview: Judges.

²⁰⁷ In the 2012–13 financial year and prior to the changes made by the researcher, there were 108 duty lawyer attendances. In the 2013–14 financial year, after the introduction of the changes, there were 214 duty lawyer attendances in Hobart, representing a 98% increase. In the 2014–15 financial year, the researcher recorded 298 attendances, a further 39% increase from the previous year.

services, needed a systemic and collaborative approach between the researcher, the duty lawyer in Launceston and the management of LACT.

Recommendations for further reform of the Scheme are discussed in Chapter VI. The improvements will contribute to meeting demand in a consistently high area of need and strengthen early intervention efforts. Not all the reforms recommended may be able to be implemented, and there may be outcomes which occur beyond the scope of the recommendations, but all are made with a view to improving the situation for SRLs and increasing the effectiveness and efficiency of the family law system.

D Part III: Survey of stakeholders

Beyond hearing the views of the judges, the duty lawyers and SRLs, it was important to gather data from court staff and family law practitioners, including those who are ICLs, on their interaction with the Scheme. Court staff and family law practitioners were grouped together as ‘stakeholders’ for the practical purpose of conducting a single survey of legal and non-legal professionals who have wide exposure to SRLs in the family courts. This section of the chapter presents the quantitative survey data and comments provided by these stakeholders.²⁰⁸

This survey was conducted from 3 to 17 August 2015, over two years after the survey of SRLs.²⁰⁹ It is considered that the changes made to the Scheme during the gap between the two surveys resulted in significantly different responses to the research questions. In any case, the surveys contained different questions.²¹⁰

(a) Limitations of the stakeholder survey

When constructing the Stakeholder survey, the researcher experienced a number of difficulties with writing effective questions and following a consistent design. While the survey produced results from which useful conclusions could be drawn, weaknesses affected coding and analysis. The survey was too long, some of the questions were too complex, and some of the answer options unclear. These limitations were discussed in greater detail in Chapter III G 3.²¹¹ The strength of the survey is that it produced data which responded to the

²⁰⁸ Stakeholders are court staff at the combined registry of the FCA and FCC in Hobart and Launceston, and family law practitioners who are members of the Family Law Practitioners Association (TAS) (FLPAT).

²⁰⁹ The SRL survey was conducted from 13 May to 28 June 2013 and the stakeholder survey from 3 to 17 August 2015.

²¹⁰ See Appendix A for Questions to SRLs and Appendix D for Questions to stakeholders.

²¹¹ See Chapter III: G: Methods of analysis for discussion of limitations arising from the research design and implementation of the survey instruments.

research questions, and the comments by participants enhanced its trustworthiness.

(b) Demographics

There are 22 court staff of the combined registry of the FCA and FCC, 15 in Hobart and 7 in Launceston. The response rate of 14 of 22 was made up of one Registrar, one person who identified as 'court staff,' seven who nominated 'registry staff' and five judge's associates.

There were 47 members of FLPAT at the time the survey was conducted.²¹² Over half of the family law practitioners who were members responded (N=26 of 47, 55%). Nine of these 26 respondents were also ICLs.²¹³

The majority of the 38 stakeholder respondents were family law practitioners (N=26 of 38, 68%).²¹⁴

1 RQ1: How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?

This first research question on access to justice explored stakeholders' views on the stage of the proceedings at which the duty lawyer should intervene, what awareness there was of the Scheme, where the duty lawyer should be located to be more visible, and the source and numbers of referrals of SRLs to the duty lawyer.

²¹² The membership number is as advised by the Secretary of the FLPAT Committee by email on 5 November 2015. Not all lawyers who practice family law are FLPAT members.

²¹³ Independent Children's Lawyers are appointed by the Family Court (under the *Family Law Act 1975* (Cth) s.68L) to represent the child's best interest in certain circumstances in a parenting case. ICLs are not the child's representative but report to the court on what arrangements or decisions are in the child's best interests. ICLs are funded by the LACs.

²¹⁴ Also see Chapter III: G 2 for response rate for stakeholder survey.

Table 21 Stakeholders' views on 'access to justice'

Question 17. What do you think 'access to justice' means			
Option	Stakeholders	Response Count	N=38
That everyone should get legal aid		0	0%
That everyone should be represented	11*	1	3%
That everyone should be able to receive legal advice (short of representation)	1*, 2*, 3*, 4*, 5*, 6*, 12*, 14*, 15*, 17*, 18*, 20*, 21*, 22*, 23*, 26*, 27*, 28*, 30*, 31*, 33*, 36*, 37*, 38*	24	63%
That everyone has a right to address the judge personally	14*, 25;	2	5%
That everyone has a right to a fair hearing	1*, 2*, 6*, 8; 9; 10; 11*, 12*, 13*, 14*, 15*, 16*, 17*, 18*, 20*, 21*, 23*, 24; 26*, 27*, 28*, 30*, 31*, 32*, 34*, 36*, 37*, 38*	28	73%
That everyone should be treated equally by the courts	1*, 2*, 3*, 4*, 5*, 6*, 11*, 12*, 13*, 14*, 16*, 17*, 18*, 20*, 21*, 22*, 23*, 26*, 27*, 28*, 30*, 31*, 32*, 33*, 34*	26	68%
Answered		38	100%
Provided comment		2	5%

Multiple responses in tables are denoted by an asterisk.

Question 17 sought to elicit stakeholders' views on a theoretical level of what they thought 'access to justice' meant. Participants were able to select multiple responses, as can be seen by the table, and also to comment. The majority of responses characterised access to justice as everyone having 'a right to a fair hearing,' that 'everyone should be treated equally by the courts' and that 'everyone should be able to receive legal advice (short of representation)'. It is understandable that professionals working in the legal system believe that access to *the courts* and treatment *in the courts* represented access to justice. One family law lawyer who did not choose an answer commented instead:

Access to justice is about the removal of barriers allowing everyone the same access and rights to the courts, legal resources and representation.²¹⁵

Another family lawyer provided a more practical meaning to the term and outlined the benefits of a duty lawyer providing advice which might take the dispute out of the court:

²¹⁵ Stakeholder 19.

Not everyone should get Legal Aid-funded representation ... far more should have access to duty lawyers ... Legal advice does help to identify areas of agreement and a 'range' of what's reasonable, and that there are circumstances when getting out of Court (or not starting in Court) is preferable for everyone (not least the child). I don't think everyone should be treated equally — rather, they should be treated equitably.²¹⁶

(a) How does the Scheme operate as an early intervention strategy?

Table 22 Stakeholders' views on the stage at which the duty lawyer should assist an SRL

Question 14. In your opinion, at what stage of the process ought the duty lawyer be involved?			
Option	Stakeholders	Response Count	N=38
Before the commencement of proceedings	2; 5; 8*; 9; 11; 13*; 14*; 15*; 16*; 18*; 26*; 27; 29*; 30*; 33*; 34; 35*; 37*; 38	20	53%
Only on the day their matter is in court	1*; 4; 6; 10; 13*; 15*; 21; 22*; 23; 24; 26*; 27; 28; 32	14	36%
At different stages of litigation, particularly as matters become more complex	1*; 7; 8*; 14*; 15*; 16*; 17; 18*; 22*; 25*; 29*; 30*; 33*; 35; 36	15	39%
At all stages of litigation	3; 12; 18*; 19; 20; 25*; 31; 35*; 37*	9	24%
Answered		38	100%
Provided comment		2	5%

It was important to hear from stakeholders when they thought the duty lawyer's intervention was of benefit, and to whom. The responses would provide insight on how stakeholders think the Scheme fits into notions of early intervention and the nature of those interventions.²¹⁷ The majority of stakeholders (N=20 of 38, 53%) selected 'before the commencement of proceedings' and some said 'at all stages' (N=9 of 38, 24%) and others 'at different stages' (N=15 of 38, 39%). This may be taken as including before the commencement of proceedings. Stakeholders made multiple selections, which may mean that they thought the duty lawyer should be involved at all stages of proceedings. Over one-third (N=14 of 38, 36%) of stakeholders thought assistance should only be offered on the day an SRL's matter was in court. This may indicate some concern on the

²¹⁶ Stakeholder 25.

²¹⁷ See Chapter IV: D Part III: 2 which presents the response of stakeholders to the research question, What is the purpose and nature of the duty lawyer service

part of family lawyers that anything other than that type of assistance may be seen as continuous representation.

(b) What awareness is there about the Scheme and the services the duty lawyer provides?

Table 23 Stakeholders' knowledge and awareness about the duty lawyer

Question 3: Do you know that there is a duty lawyer available to help Self-Represented Litigants (SRLs) in Family Law matters?			
Options	Stakeholders	Response Count	N=38
Yes	All	38	100%
No		0	0%
Answered		38	100%

A central principle of access to justice is that SRLs have knowledge and awareness of their legal rights and what resources are available to help them.²¹⁸ Questions 3–6 were designed to provide data on the awareness, visibility and use of the duty lawyer service on the part of the stakeholders and draw out whether there were consistencies between their knowledge, understanding and use of the service and the results from the survey of SRLs. Responses would also reveal any gaps which would need to be addressed. Lack of awareness is a barrier to access to justice.

All stakeholders knew about the Scheme, as expected. Of more importance was whether stakeholders thought SRLs were aware of the duty lawyer service.

Table 24 Stakeholders' views on whether it is clear that a duty lawyer is available for SRLs.

Question 4: From your observations or experience, do you think it is made clear to SRLs that there is a duty lawyer available to help them?			
Options	Stakeholders	Response Count	N=38
Yes	All others	29	76%
No	1; 2; 6; 7; 8; 9; 23; 29; 30	9	24%
Answered		38	100%

Question 4 was linked to Questions 5 and 6, which provided a range of answer options and allowed for ranking to find out why the awareness might be high or

²¹⁸ Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper delivered at the Law and Justice Foundation of NSW's Access to Justice Workshop, NSW Parliament House, Sydney, 10 July 2002).

low. Three-quarters (N=29 of 38, 76%) of all respondents to Question 4 indicated that they thought it was made clear to SRLs that there is a duty lawyer available to help them. Nearly a quarter (N=9 of 38, 24%) disagreed, with one family lawyer commenting:

Questions 4 and 5 are badly worded. Question 4 needs to have the word 'sometimes' as an option. That is what I would have selected. My answer 'yes' is directly linked to the fact that the judge will generally refer the person to the duty lawyer.²¹⁹

Another family lawyer stakeholder said that there should have been another question choice: practitioners refer SRLs to the duty lawyer at court.²²⁰ This comment indicates the level of interest and involvement of family lawyers in the Scheme when they have SRLs on the other side of their matter.

Table 25 Stakeholders' view on visibility of duty lawyer

Question 5: If the answer to the previous question was 'Yes', from your observations, is it because: (Select as many as apply.)			
Option	Stakeholders	Response Count	N=29
There is signage at the Registry	3*, 10*, 12*, 13*, 15; 18*, 20*, 21*, 22*, 25; 27; 34*, 35*, 36*, 37*	15	
There are brochures about the Duty Lawyer at the Registry	3*, 10*, 11*, 12*, 14*, 18*, 20*, 21*, 22*, 24*, 25*, 33*, 34*, 35*	14	
There are brochures about the Duty Lawyer attached to all court forms	18*, 34*	2	
There are references to the Duty Lawyer on court websites	11*, 22*, 18*	3	
There are references to the Duty Lawyer on the Legal Aid website	3*, 11*, 17*, 18*, 22*, 25*, 34*, 36*	8	
The Duty Lawyer announces BEFORE each court sitting that he/she is available to assist	3*, 5; 10*, 11*, 14*, 16; 17; 18*, 24*, 25*, 33*, 34*, 36	13	
The Judge always asks SRLs if they would like the Duty Lawyer to assist	4; 13*, 17*, 18*, 19; 24*, 26; 27; 28; 31; 32; 36*, 37*, 38	14	
Court officer announces BEFORE each court sitting that a Duty Lawyer is available to assist	14*, 18*, 33*	3	
The Duty Lawyer wears identification	3*, 13*	2	
Answered		29	
No answer	1;2;6;7;8;9;23;29;30	9	
Provided comment	4		

In this table, N = 29 as only 29 of the 38 respondents answered 'Yes' to the previous question.

²¹⁹ Stakeholder 19.

²²⁰ Stakeholder 32.

Generally, stakeholders who responded to Question 5 indicated that promotional material informed SRLs about the duty lawyer, with the highest ranking given to signage at the registry (N=15 of 38, 51%) closely followed by brochures in the registry (14 of 29). There was significant recognition of the judge's role (14 of 29) and the duty lawyer's announcements (13 of 29). References to the duty lawyer on websites,²²¹ other promotional material²²² and announcements by the court officer²²³ were also acknowledged. It is interesting that two stakeholders referred to the duty lawyer wearing identification. That is not the case, and it may have been misleading to put it as an option. It may be that the stakeholders are familiar with and recognise the duty lawyer.

A family lawyer said:

My answer 'yes' is directly linked to the fact that the Judge will generally refer the person to the duty lawyer. I otherwise think there is insufficient signage and there needs to be better publication of the duty lawyer's presence and availability.²²⁴

Court staff made a number of comments suggesting additional question choices:

- registry staff make clients aware of the service at the counter;²²⁵
- the registry staff raise it with SRLs when they present at the counter either to file or for court events;²²⁶
- Registrar always asks SRLs if they wish to use the Duty Lawyer Service. Judge does but not always;²²⁷
- registry staff inform SRLs;²²⁸ and
- duty lawyer comes with me when I call through new matters; she also introduces herself in the waiting area before Court starts.²²⁹

²²¹ References on court websites (3 of 29) and Legal Aid website (8 of 29).

²²² Brochures attached to court documents (2 of 30).

²²³ Court officer announces before each court sitting (3 of 30).

²²⁴ Stakeholder 19.

²²⁵ Stakeholder 22.

²²⁶ Stakeholder 21.

²²⁷ Stakeholder 18.

²²⁸ Stakeholder 15.

In general terms, court staff are usually the first to see SRLs. The strong responses from this set of stakeholders indicates that they promote the Scheme and ensure that SRLs are referred to the duty lawyer. Responses suggested why (or why not) referrals were made to the duty lawyer. All respondents said they knew there was a duty lawyer available.

Question 6 below offered answer choices similar to Question 5 and sought not only to corroborate the data from the previous question but to draw out any gaps or inconsistencies which might lead to recommendations for reforms to increase the awareness and use of the duty lawyer service.

Table 26 Stakeholders' views on why the duty lawyer may not be visible

Question 6. If the answer to the previous question was 'No', please state why. (Select as many as apply.)			
Option	Stakeholders	Response Count	N=9
No signage at the Registry	2*; 7*; 8*; 29*	4	
No brochures about the duty lawyer at the Registry	7*; 8*; 23*; 29*; 30*	5	
No brochures about the duty lawyer attached to all court forms	29*	1	
No reference to the duty lawyer on court websites		0	
No reference to the duty lawyer on the Legal Aid website		0	
No announcement made by the duty lawyer BEFORE each court sitting that he/she is available to assist	1*; 2*; 6*; 9*; 23*; 30*	6	
The Judge does not always ask SRLs if they would like the duty lawyer to assist	1*; 2*; 6*; 8*; 23*	5	
No announcement made by court staff BEFORE a court sitting that a duty lawyer is available to assist	1*; 2*; 6*; 7*; 9*; 23*; 30*	7	
The duty lawyer does not always wear identification	2*; 6*; 9*; 23*; 29*	5	
Other: Please comment		1	
Answered		9	
No answer		29	
Provided comment		1	

Of the nine responses received to Question 6, all but one²³⁰ were from family law practitioners. The responses and reasons provided in this question are seemingly inconsistent with those for Question 5: whereas signage and

²²⁹ Stakeholder 16.

²³⁰ Stakeholder 30.

brochures at the registry had been identified as the highest reason for visibility in response to Question 5,²³¹ responses to this question rated both at the lowest end of the range: 4 of 9 respondents for signage and only 2 of 9 for brochures. Similarly, whereas announcements by the judicial officer and the duty lawyer rated second to the promotional material in the responses to Question 5,²³² for Question 6 they were at the top of the scale for reasons why SRLs might *not* know about the duty lawyer, with 6 of 9 saying that the duty lawyer did not make an announcement and 5 of 9 indicating the judge did not offer SRLs duty lawyer assistance.

Of particular interest was that 7 of 9 thought the reason the service might not be known about was that court staff did not announce that a duty lawyer was available before each court sitting. This is inconsistent with responses to Question 5, which placed court staff at the bottom of the scale. It is at odds with comments made by some court and registry staff.²³³

Table 27 Stakeholders' views on where duty lawyer should be located

Question 7. Where do you think the duty lawyer should be located to make the service more visible?			
Option	Stakeholders	Response Count	N=38
At the court	1; 2; 4; 5; 7; 8; 9; 10; 11; 13; 15; 16; 17; 18; 19; 20; 21; 22; 23; 24; 25; 26; 27; 28; 29; 30; 31; 32; 34; 35; 36; 37; 38	33	87%
At Legal Aid	33	1	3%
No opinion	3; 14	2	5%
Other	6; 12	2	5%
Answered		38	100%
Provided comment		6	16%

²³¹ No signage at the registry and no brochures both attracted responses from 4 of 9 respondents compared to responses to the previous question which indicated 14 of 30 for signage and 13 of 30 for brochures.

²³² Question 5 response: 'The judge always asks SRLs if they would like the help of the duty lawyer' attracted 14 of 30 and 'The duty lawyer announces before each court sitting that he/she is available to assist' attracted 13 of 30 responses.

²³³ Question 5 response: 'Court officer announces before each court sitting' attracted 3 of 30 and was the second to last reason given why the duty lawyer service might not be visible or known to SRLs.

Relying on local knowledge, respondents could easily have chosen either the offices of Legal Aid or the court. Overwhelmingly, stakeholders said that duty lawyers should be located at the court (N=33 of 38, 87%).

Six stakeholders provided comments on Question 7. The following comments from two family law practitioners illustrate the general view:

The duty lawyer only needs to be the court face — there are other places an SRL can get help e.g. legal aid advice line or clinic with other stages of a matter.²³⁴

People should be able to seek advice before starting proceedings, which is to some degree available through the clinic at the Court, though capacity is currently limited. That might help restrict applications to seeking sensible Orders and help ensure that family violence/risk of child abuse is detected and flagged, that proper referrals are made and that there is the necessary evidence to support the Orders. As previously mentioned, if a matter actually goes to trial/final hearing, an SRL may have to run their own case — otherwise it may be dangerous in terms of the case being fully put [and blame if it's not].²³⁵

Only one family law practitioner said Legal Aid. Another said 'both', and two chose 'other' without commenting where.

An interesting and worthwhile suggestion was made by a staff member of the court's registry:

When the DL is in court assisting an SRL, there could be a meeting point for other SRLs requiring DL assistance closer to the court room where the SRLs could wait.²³⁶

Responses from the survey of stakeholders were compared with data from the interviews and the survey of SRLs to confirm that almost everyone thought the duty lawyer should be based at the court. Comments by family law practitioners ranged from:

²³⁴ Stakeholder 6.

²³⁵ Stakeholder 25.

²³⁶ Stakeholder 12.

There is a room marked duty lawyer but there is no announcement that that is where a person can seek help and there is no lawyer obviously available.²³⁷

to:

People are more likely to notice and take up the service if the duty lawyer is present at court during court sittings. Once contact with the duty lawyer has been made, then perhaps other assistance may take place elsewhere. This is because people leave things to the last minute, think they'll be able to do things themselves and then can't, or the like.²³⁸

This series of questions was designed to determine if there is a relationship between knowledge, awareness and the proximity of the duty lawyer, and how often people referred SRLs to the duty lawyer. It would be reasonable to infer from the responses that if the duty lawyer were visible and accessible, more people would refer SRLs to the duty lawyer and more SRLs could use the service.

Table 28 Stakeholders' referrals of SRLs to the duty lawyer

Question 8. Have you ever referred SRLs to the duty lawyer?			
Option	Stakeholders	Response Count	N=38
Yes	All others	34	89.0%
No	1; 15; 24; 38	4	11.0%
Answered		38	100%

Question 8 sought to track the source of the majority of referrals to the service. The issue of referrals is closely linked to Question 9 and Questions 12–16, which enquired which stakeholders made use of the duty lawyer service, the extent to which they did, under what circumstances they thought a duty lawyer should assist SRLs, and what interventions would be most beneficial to SRLs and the court system.

²³⁷ Stakeholder 6.

²³⁸ Stakeholder 25.

Four respondents said they had not referred anyone to the duty lawyer: two court staff who said they did not have client contact,²³⁹ and two family law practitioners.²⁴⁰

Table 29 Stakeholders' referrals of SRLs, May–August 2015

Question 10: How many SRLs have you referred in the last 3 months?			
Option	Stakeholders	Response Count	N=38
1-5	3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 16; 17; 23; 26; 27; 28; 29; 30; 31; 32; 35; 36; 37	23	68%
6-10	2; 13; 19; 20; 22; 25	6	18%
11-15	18; 31	2	6%
16-20	14	1	3%
21+	21; 34	2	6%
Answered		34	89%
Not answered	1; 15; 24; 38	4	11%

Question 10 sought to identify who made the majority of the referrals to provide information about the level of SRL interest in the service in the three months prior to the survey.²⁴¹ Eighty-nine per cent (N=34 of 38) responding to Question 8 indicated they had referred SRLs to the duty lawyer, and 68% (N=23 of 34) of those stakeholders responding to Question 10 noted they had referred 1 to 5 SRLs in the last three months. The next highest referral was 6 to 10 SRLs at 18% (N=6 of 34), with two people nominating 11–15 SRLs and one person 16–20 SRLs. Two people indicated they had referred over 21 SRLs. It is not surprising that the highest number of referrals with responses that they had referred more than 21 SRLs in the last three months (N=2 of 38, 6%) came from court staff in daily contact with SRLs who showed greater awareness of the duty lawyer service.²⁴² Similarly, the referrals between 11 and 15 and 16 and 20 came from court staff. One of those who indicated they had made between 11 and 15 referrals was an ICL.

²³⁹ Stakeholders 15 and 38.

²⁴⁰ Stakeholders 1 and 24.

²⁴¹ The survey was conducted from 3 to 17 August 2015.

²⁴² See Results from Questions 3, 4, 5 and 6.

Questions 15 and 16 sought to identify which stakeholders used the duty lawyer service, how regularly it was used, and the circumstances under which such use was considered appropriate.

Table 30 Stakeholders' referrals of SRLs to duty lawyer

Question 15. How often do you ask an SRL whether they need the assistance of the duty lawyer?			
Option	Stakeholders	Response Count	N=38
Always	6; 19; 21; 22; 23; 33; 35	7	18%
Nearly always	10; 12; 14; 18; 25; 27; 31; 32; 34; 38	10	26%
Some of the time	2; 4; 5; 7; 8; 9; 11; 13; 16; 17; 20; 26; 30; 36; 37	15	40%
Rarely	1; 3; 28; 29	4	11%
Never	15; 24	2	5%
Answered		38	100%

This question sought to test stakeholders' responses to previous questions relating to the frequency of referrals, as a guide as to whether more work was needed to raise awareness. It was also designed to remind family law practitioners, in particular, that they could be proactive if they had an SRL on the other side of their matter by asking if the SRL needed the help of the duty lawyer.

The largest proportion of the respondents to Question 15 (N=15 of 38, 40%) said they asked SRLs 'some of the time', while a quarter (N=10 of 38, 26%) said 'nearly always' and 18% (N=7 of 38) said 'always'. Of that number, the responses were evenly split between court staff and family law practitioners. One interesting result is that half the practitioners were ICLs. Of the 11 per cent (N=4 of 38) who said 'rarely', two were ICLs and the other two family lawyers. Of the two (N=2 of 38) who said 'never', one was a member of the court staff who 'rarely had client contact' and the other was a family lawyer who did not provide an explanation.

Table 31 Stakeholders' reasons why they may/may not have referred SRLs to duty lawyer

Question 16. If the answer to the previous question was 'Rarely' or 'Never' can you please say why?			
Option	Stakeholders	Response Count	N=38
I represent the other party and it is not my job to help SRLs	5*; 28; 29*	3	8%
I am the ICL and it is not my job to help SRLs		0	0%
There was no duty lawyer available on that day	1*; 3*; 7; 28; 34	5	13%
I expect the duty Lawyer to volunteer rather than be asked to help	1*	1	1%
I was aware that the duty lawyer was busy	5*	1	1%
I assume that the SRL has decided to appear unrepresented	29*	1	3%
Other	2; 3*; 15; 24	4	10%
Answered		9	23%

Some family law practitioners in response to Question 15 who either said 'some of the time', 'rarely' or 'never' gave reasons at Question 16:

I was busy, also often SRLs do not want to listen to advice other than what they want to hear.²⁴³

I direct the duty lawyer to the SRL so it does not appear to the SRL that I am involved with the duty lawyer which may prejudice their acceptance of the advice or assistance.²⁴⁴

One court officer said that they asked SRLs whether they needed the assistance of the duty lawyer 'on duty days only'.²⁴⁵ Another said, '[i]t is Registry procedure to alert SRLs to the presence of a duty lawyer when they present at the Registry'.²⁴⁶ A third said they 'nearly always' ask an SRL but that it 'depends on what the client's needs are'.²⁴⁷ The only court officer who said 'never' explained that 'I rarely have client contact'.²⁴⁸ Another said that they referred SRLs 'some of the time' because 'many that you ask refuse, these are usually the ones that need the help the most'.²⁴⁹ One said 'some of the time' and explained that it was on occasions 'when an SRL seems to be particularly

²⁴³ Stakeholder 2.

²⁴⁴ Stakeholder 3.

²⁴⁵ Stakeholder 22.

²⁴⁶ Stakeholder 21.

²⁴⁷ Stakeholder 14.

²⁴⁸ Stakeholder 15.

²⁴⁹ Stakeholder 16.

uncertain about some aspect of coming to court or what they are required to do, etc.’²⁵⁰

It may be a weakness in the survey design that the question was not rephrased to ask all participants the reason for their answer. This may have provided a more balanced outcome, with insights into the positive and negative aspects of referrals.

Table 32 Stakeholders’ views on the benefits of the Scheme

Question 25: What are the advantages/disadvantages/limitations of the duty lawyer service? Select as many as apply				
Option	Stakeholders	Response Count	N=38	
There is never enough time for each SRL	3*; 7*; 9*; 11*; 12*; 13*; 16*; 17*; 20*; 21*; 22*; 23*; 27*; 28*; 29; 30*; 31*; 32*; 33*; 34*; 35*; 38	22	58%	
It is a ‘once only’ service delivery model	3*; 8; 11*; 12*; 15; 18*; 20*; 23*; 24*; 28*; 29*; 32*; 33*	13	34%	
There are not enough duty lawyers available	1*; 2*; 4; 7*; 9*; 12*; 13*; 16*; 17*; 19; 21*; 22*; 25*; 26; 27*; 29*; 30*; 31*; 34*; 35*; 36*; 37; 38	23	61%	
The duty lawyer was inexperienced	7*; 17*	2	5%	
The duty lawyer was not competent	0	0	0%	
The duty lawyer was not interested	1*	1	3%	
There is insufficient information about what the duty lawyer does	5; 6; 11*; 16*; 17*; 23*; 24*; 25*; 29*; 32*; 34*	11	29%	
The advice and representation on one occasion does not level the playing field	1*; 2*; 3*; 7*; 11*; 17*; 18*; 20*; 22*; 23*; 24*; 25*; 31*; 32*; 33*; 35*; 36*	17	45%	
The Scheme is a flawed model offering the illusion of representation	1*	1	3%	
Other	10; 14; 25*; 31*	4	10%	
Answered		38	100%	
Provided comment		5		

Question 25 is located in this section of the results as it is connected to the research question of how to improve access to justice for SRLs. The question sought to understand any limiting factors on the duty lawyer’s capacity to provide the service which, in turn, created limitations on SRLs’ access to justice. Nearly two-thirds of stakeholders thought there were not enough duty lawyers available (N=23 of 38, 61%) and they ‘never have enough time’ for each SRL

²⁵⁰ Stakeholder 30.

(N=22 of 38, 58%). The fact that the duty lawyer can only assist SRLs once was thought to be a limiting factor in delivering access to justice, which, when linked with the proposition that this model does not 'level the playing field' for SRLs, revealed that a high proportion of the stakeholders think that the current service model does not provide a suitable solution to the problem SRLs have in accessing justice.

Although two stakeholders said the duty lawyer was inexperienced and one that she was not interested, no stakeholder thought that she was incompetent. These results are relevant to previous research²⁵¹ and the comments made by judges in the previous section of this chapter,²⁵² that recognise the importance of providing SRLs with the opportunity to spend extended time with experienced duty lawyers.²⁵³

Another important result was that eight of the respondents who thought there was insufficient information on what services the duty lawyer provides were family law practitioners. This result confirms comments made by stakeholders that there remains confusion about what the duty lawyer can and cannot do.²⁵⁴ Although there had been a program raising awareness of the Scheme during the action research phase, it may be necessary to revisit the issue of continuing presentations to legal and non-legal service providers. This aspect is discussed further in Chapter VI.

A family law practitioner who is also an ICL selected 'never enough time', 'not enough duty lawyers' and 'advice on one occasion does not level the playing field' commented:

²⁵¹ Forell and Cain, above n 82; Productivity Commission, above n 12, vol 1. The Report discusses the benefits of having mature and experienced practitioners taking on the duty lawyer role in recognition of the stress of performing at a high level.

²⁵² See Chapter IV: Part I: B.I.B: Interview: Judge 2. The judge comments that duty lawyers need to be experienced lawyers who value add to the Scheme by training other lawyers.

²⁵³ Forell and Cain, above n 82; Productivity Commission, above n 12, vol 1.

²⁵⁴ Stakeholder 25.

It is extremely important for a DS to be competent and experienced as an incompetent and or inexperienced DS is akin to having no DS assistance at all.²⁵⁵

Another family lawyer who chose 'other' said:

I do not consider it has disadvantages/limitations as is. It is a service being provided to SRLs on Court dates. It provides a competent, capable service.²⁵⁶

A family lawyer who selected 'not enough duty lawyers', 'insufficient information about what the duty lawyer can and cannot do' and 'does not level the playing field' added:

At times, the pressure of the list means that there is less time than would be helpful for some SRLs. Also, at times, the represented party's lawyer complains about having to wait until the duty lawyer is available, though of course, at times others have to wait for them ... It is a difficult balance for a duty lawyer to give consistent information about what they can do, and yet remain flexible and able to direct their time to where it will have greatest impact. Although duty lawyer assistance on one occasion only is not necessarily a hard-and-fast rule as I understand it (see above), some people need ongoing representation, especially in matters involving family violence or child abuse. The duty lawyer service, though, significantly assists to level the playing field.²⁵⁷

A client services officer of the court selected 'other' and said:

Ability to assist through to the (defended hearings) for some clients would be beneficial.²⁵⁸

Responses to this question may be interpreted as suggestions on how to improve access to the duty lawyer service as a way of providing greater access to legal advice and assistance for SRLs. This issue is explored in greater detail in the next chapter.

²⁵⁵ Stakeholder 31.

²⁵⁶ Stakeholder 10.

²⁵⁷ Stakeholder 25.

²⁵⁸ Stakeholder 34.

2 RQ2: What is the purpose and nature of the duty lawyer role?

Questions sought responses on what stakeholders think are the important things the duty lawyer should be doing and what potential benefits the intervention of the duty lawyer might impart to all those involved in the family court system.

Although Question 10 specifically asked 'What is the main purpose of the duty lawyer scheme?', Questions 11, 12 and 13 were aimed at eliciting responses which might allow comparison for consistency. Respondents indicated that the duty lawyer has a multitude of roles and is expected to fulfil a number of significant needs. On the whole, stakeholders considered that the services SRLs needed were those which would improve the efficiency of the court.

Table 33 Stakeholders' views of the main purpose of the duty lawyer service

Question 10: What do you see as the main purpose of the duty lawyer service?						
Option	Very Important	Important	Neither	Of little importance	Not Important	Count
To represent and help people who do not have a lawyer and 'level' the playing field	10	17	7	1	0	35
To ensure SRLs get a fair hearing	10	19	6	1	0	36
To help SRLs get access to justice	9	23	5	0	0	37
To help Judges control SRLs and save time	13	16	6	1	1	37
To help the court system run more efficiently and effectively	21	16	0	0	1	38
To give SRLs realistic advice about the merits of their matter	22	12	1	1	1	37
To divert SRLs from to courts to more appropriate services	6	3	18	7	7	38
To give priority to and represent vulnerable people	2	3	18	7	7	37
To help SRLs get the result they want	2	3	18	7	7	37
Answered						38

Previous research has viewed SRLs as a problem for the courts because they take up court time and require greater judicial attention. The findings from the interview of judges revealed that they were conscious they needed to ensure that SRLs were not unfairly treated while maintaining their impartiality and

avoiding perceptions of bias.²⁵⁹ Question 10 was multiple choice, designed to learn what stakeholders thought was the purpose of the Scheme.

The majority of respondents (N=37 of 38, 97%) indicated that it was either 'very important' or 'important' that the duty lawyer 'help the court system run more efficiently and effectively'. Placing that result with the 76% (N=29 of 38) who indicated that the main purpose was 'to help judges control SRLs and save time', and the 71% (N=27 of 38) who chose representation and advice, stresses that stakeholders considered the main purpose of the Scheme was to improve the conduct of the court's process. The result that 89% (N=34 of 38) thought it was either 'very important' or 'important' that SRLs get early advice about the merits of their case reinforces the concern with the efficient conduct of the court. The assumption appears to be that if the duty lawyer provided SRLs with a 'reality check', they might either discontinue their matter or adjust their expectations and the matter would proceed more quickly. The result is consistent with a concern that SRLs should not pursue a frustrating and hopeless cause.

The responses that the duty lawyer's role was to provide SRLs with a fair hearing and access to justice showed that these aspects were important to stakeholders, but they were outweighed by considerations of the contribution the duty lawyer made to the improved running of the court. The duty lawyer assisting SRLs to get the result they want attracted the highest neutral response (N=18 of 38, 49%) and was considered 'little' or 'not at all important' by about a third of stakeholders (N=14 of 38, 38%). This is consistent with the responses to Question 12 and suggests the focus for stakeholders is on fairness and equity issues rather than the needs of individual SRLs.

²⁵⁹ See Chapter IV: B.I.B: Interview: Judge 1 said there was a need to be mindful that the other party did not perceive bias when a judge assisted an SRL; Interview: Judge 2 said there was more pressure on the judge to ensure a level playing field when there is an SRL involved and that it was important that the judge not be seen as an advocate for one party or the other and maintain impartiality; also see Family Court of Australia, *Self-Represented Litigants: A Challenge—Project Report December 2000–December 2002* (Family Court of Australia, 2003); Law Reform Commission of Western Australia, *Review of the Criminal and Justice System in Western Australia – Final Report Project 92* (Law Reform Commission of Western Australia, 1999) 153.

A surprising result is that many stakeholders were neutral about the duty lawyer helping vulnerable people or providing referrals which would divert matters from the court. This view is inconsistent with the literature.²⁶⁰ However, it does reflect the views of SRLs, who also did not rate being referred to other services as something that was important to them.

The responses present a perspective which is consistent with the findings from the interviews with the judges, namely that the primary purpose of the duty lawyer in helping SRLs is to improve the effectiveness of the court system.

Table 34 Stakeholders' views on what the service is delivering

Question 11. What do you believe the duty lawyer service is delivering? Please select as many as apply.			
Option	Stakeholders	Response Count	N=38
Facilitating the efficient working of the family court system	1*; 2*; 4*; 5; 7; 8; 13*; 18*; 19; 21*; 23*; 24*; 28; 29*; 35*	15	39%
Providing access to justice for SRLs	10*; 19; 21*; 23*; 24*; 26*; 35*	7	18%
Helping SRLs to get a fair hearing	18*; 21*; 23*	3	8%
Providing SRLs with better options for settlement	2*; 4*; 13*; 18; 23*; 24*; 26*; 35*	8	21%
Easing the pressure on all those involved in the family court system	1*; 2*; 4*; 10*; 13*; 23*; 24*; 29*; 35*	9	24%
All of the above	3; 6; 9; 11; 12; 14; 15; 16; 17; 20; 22; 25; 27; 30; 31; 32; 33; 34; 36; 37; 38	21	55%
Answered		38	100%
Provided comment		4	

Question 11 is closely tied to the previous question addressing the themes of whom or what the Scheme benefits, and how. The answer options allowed for multiple answer selections. They also provided stakeholders an opportunity to expand on the theme 'access to justice', which is the focus of Question 17.

²⁶⁰ See Chapter I: F (i) NSWLA Pilot Program where the report indicated there was satisfaction that the duty lawyer service diverted matters from the court; Chapter 2, 5, Productivity Commission, vol 1, [Box14.2]; Allen Consulting, above n 192; Coumarelos et al 2012, above n 10; Forell and Cain, above n 82 noting that the EIU diverts SRLs from the courts by referring them to more appropriate services.

(a) To assist in the efficiency and effectiveness of the court

The majority (N=15 of 38, 39%) responded that the duty lawyer's intervention led to efficiency improvements in the court. The responses to this question are consistent with those received to Questions 12 and 13 (following), which gave a very high rating to all services the duty lawyer could provide which would improve outcomes for SRLs but, more importantly, enhance the efficiency of the court.

Over half (N=21 of 38, 55%) chose 'all the above', which suggests that stakeholders recognise that duty lawyers provide a range of services which provide significant benefits for all those involved in the family law system, not least for SRLs and the professionals working in the courts. Of particular note is that one-third of stakeholders (N=7 of 38, 18%) put 'providing access to justice for SRLs' as only fifth out of six choices; however, if that figure is added to those who chose 'all the above' (N=28 of 38, 55%), it suggests that stakeholders consider that the Scheme represents an access to justice measure for SRLs.

As an indicator that duty lawyer services are not available consistently throughout Tasmania, a family lawyer noted that the duty lawyer service was 'facilitating the efficient working of the family court system' but added '[t]here is little assistance in Burnie'.²⁶¹

Not all comments were favourable. Although a family law practitioner chose 'all the above,' they qualified it by adding:

The better question is what could the service deliver if it was working well.²⁶²

This lawyer did not elaborate on what more the service could provide or how it could operate more effectively.

Another practitioner who also said 'all of the above' added:

²⁶¹ Stakeholder 7.

²⁶² Stakeholder 6.

How things work at court makes sense once you have enough of the background information. People don't have that — mostly, they're led astray by watching American television and hearing what happened to their friend's ex's cousin. There is only so much the opposing lawyer or the judicial officer can do to explain without running into ethical issues or issues of bias, even if what they say is accepted by the SRL as accurate. There is also the risk for ICLs and the like that [if] they communicate too much with an SRL, the represented person has reason to think that they're biased. Basic advice has allowed sensible options to be sorted out and more detailed advice has helped indicate the 'range' of reasonable outcomes, helping with taking up court time. Of course, not everyone will accept help. From observation, it's a really bad sign for the efficient resolution of a matter when an SRL won't talk with the duty lawyer.²⁶³

Questions 12 and 13 following sought to enquire what practical services a duty lawyer could provide and what problems stakeholders thought SRLs had and the court faced which the intervention of the duty lawyer could ameliorate.

Table 35 Stakeholders' views of the most beneficial interventions by the duty lawyer

Question 12. In your opinion, what interventions by a duty lawyer would be most beneficial to SRLs?						
Option	Very Important	Important	Neither	Of little importance	Not Important	Count
Providing legal advice about the merits of their case at an early stage	26	10	0	1	0	37
Correctly filling out SRL's forms and framing Orders	17	16	4	0	0	37
Explaining court processes and procedures to SRLs	26	11	1	0	0	38
Referring SRLs to other services, if appropriate	12	21	4	0	0	37
Assisting SRLs with negotiations with the other party's lawyer	20	16	2	0	0	38
Assisting SRLs get a settlement as quickly as possible	11	13	11	2	1	38
Representing SRLs in court	14	18	6	0	0	38
Answered						38
Provided comment						4

Previous research has found that the impetus for the introduction of the Scheme came from two directions: the Family Court, which saw the duty lawyer

²⁶³ Stakeholder 25.

contributing to the efficiency of the court's process,²⁶⁴ and from commentators linking the rise in SRLs to decreases in legal aid funding and arguing that this became an access to justice issue.²⁶⁵

Question 12 (together with Question 13, below) were used to compare the consistency of stakeholders' views and to determine whether they correlated with those provided in Question 10 (above). Its aim was to get information about what stakeholders thought the duty lawyer *ought* to be doing. The question also raised the issue whether one of the benefits the Scheme provides is access to justice, the subject of Question 17.

Almost all stakeholders (N=37 of 38, 97%) said it was either 'very important' or 'important' that the duty lawyer explain 'court processes and procedures to SRLs', suggesting they think this is something with which SRLs struggle. Stakeholders gave a similarly high ranking to the duty lawyer providing SRLs with advice about the merits of their matter (N=36 of 38, 96%). The same number (N=36 of 38, 96%) thought that 'assisting SRLs with negotiations with the other party's lawyer was 'very important' or 'important'. Of interest is the low number (N=4 of 38) who chose 'neither important nor unimportant' that SRLs receive help filling out forms and framing court orders, or be referred to other services. Almost one-third (N=11 of 38, 29%) said it was 'neither important nor unimportant' that SRLs 'get a settlement as quickly as possible'.

²⁶⁴ Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and its Litigants' (Research Report No 19, Family Court of Australia, 1999); John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000); Family Court of Australia, above n 85.

²⁶⁵ See Chapter I: B (ii) Effects of Legal Aid Funding; also see Law Council of Australia, Submission to the Commonwealth Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, Legal Aid Funding in the 90's (Sydney 1994), 93; Australian Law Reform Commission, *Managing Justice—A Review of the Federal Civil Justice System*, Report No 89, (2000); Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System' (Research Project and Report undertaken by the Law Council of Australia in conjunction with Australian Institute of Judicial Administration, National Legal Aid, Aboriginal and Torres Strait Islander Legal Services), February 2004; Family Law Council, 'Litigants in Person: A Report to the Attorney-General prepared by the Family Law Council' (August 2000); Hunter et al, above n 35; Rosemary, Jeff Giddings and April Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia* (Griffith University, May 2003).

A family lawyer listed every intervention by a duty lawyer as ‘very important’ or ‘important’ and said that ‘assisting SRLs get a settlement as quickly as possible’ was ‘neither important nor unimportant’ but elaborated:

Assisting SRLs get a REASONABLE settlement as quickly as possible is important. The benefit is in the perception that an outcome is reasonable — that helps agreements to ‘stick’, which in children’s matters is very important. Actually, the difference between ‘very important’ and ‘important’ here is minimal.²⁶⁶

Table 36 Stakeholders’ views on the benefits of duty lawyer’s assistance to SRLs

Question 13. In your opinion, what interventions by a duty lawyer would be most beneficial to the court system?						
Providing legal advice about the merits of their case at an early stage	28	8	1	0	0	37
Correctly filling out SRLs’ forms and framing Orders	18	15	3	0	0	36
Explaining court processes and procedures to SRLs	26	11	1	0	0	38
Referring SRLs to other services, if appropriate	13	18	6	0	0	37
Assisting SRLs with negotiations with the other party’s lawyer	10	10	13	1	2	36
Assisting SRLs get a settlement as quickly as possible	10	10	13	1	2	36
Representing SRLs in court	15	19	4	0	0	38
Provided Comment						4
Answered						38

(b) To provide advice to SRLs on the merits of their matter

A feature of the literature is that the Scheme is an effective ‘triage’ system where duty lawyers make an early assessment of SRLs’ matters and divert them from the court’s processes if their matter is unmeritorious, or refer it to more suitable agencies for resolution.²⁶⁷ This was an efficiency measure as it was expected that genuine and appropriate matters would then progress

²⁶⁶ Stakeholder 25.

²⁶⁷ See Chapter IV: B.I.B where Judge 2 referred to duty lawyers performing triage; also see Allen Consulting, above n 192.

through the court more quickly and would also lend themselves to earlier settlement.²⁶⁸ The opinion of all participants in this study was sought on whether the duty lawyer should give SRLs a ‘reality check’ and what effect this might have. Stakeholders’ views on this matter were mixed. The majority (N=36 of 38, 96%) said it was either ‘very important’ or ‘important’ that SRLs be given this advice. On the other hand, they chose a range of options between the processes the duty lawyer could assist SRLs with, such as explaining procedures (N=37 of 38, 97%), representation (N=34 of 38, 89%) and document preparation (N=33 of 36, 87%). Responses to Question 13 in relation to merit were compared with responses to Question 10, which also sought to understand the importance stakeholders placed on this particular duty lawyer function.

Referring SRLs to other services was considered ‘very important’ or ‘important’ by the majority of respondents (N=31 of 38, 83%).

Table 37 Stakeholders’ views on the difference made by the intervention of the duty lawyer

Question 20. From your observation or experience, when a duty lawyer helps an SRL, what practical difference has the intervention made?						
Options	Strongly agree	Agree	Neutral	Disagree	Strongly disagree	Count
Documents were filled out correctly	8	22	8	0	0	38
Matter took less time in court	13	16	8	1	0	38
Representing the SRL in court relieved them of stress	13	16	9	0	0	38
Alleviated stress on all others involved in the matter	7	18	13	0	0	38
Negotiations with the other party’s lawyer’s proceeded better	12	21	5	0	0	38
Negotiations with the other party’s lawyer resulted in a settlement	3	16	16	3	0	38
Upset or angered the SRL who felt they lost control of their case	1	1	11	20	5	38
Made no difference at all	0	1	7	18	12	38
Total	67	109	70	32	17	38

Question 20 was a multiple choice question designed to gauge the effectiveness of the service as well as to see what the duty lawyer could or

²⁶⁸ Productivity Commission, above n 12, vol 1.

should have done better. It was also designed to assess whether the timing of the duty lawyer's intervention and/or the type of advice an SRL received made any difference to the outcome of a matter. The responses would guide the researcher to considerations of how the Scheme could be improved.

All stakeholders made multiple selections. The majority indicated that stakeholders 'strongly agreed' or 'agreed' that the intervention of the duty lawyer made a positive difference. Eighty-seven per cent (N=33 of 38) said that negotiations with the other party's lawyer proceeded better, rating this as the primary difference. The second highest rating was agreeing that documents were filled out correctly (N=30 of 38, 79%), closely followed by agreeing about 'matters taking less time in court' (N=29 of 38, 76%). Notably, four fifths (N=30 of 38, 79%) of stakeholders 'disagreed' or 'strongly disagreed' that the intervention of the duty lawyer made no difference at all.

(c) To relieve SRLs of stress

Three-quarters of stakeholders (N=29 of 38, 76%) considered that SRLs benefited from the intervention of the duty lawyer because it took away the stress of representing themselves in court; a slightly lower proportion (N=25 of 38, 66%) said it also reduced the stress for all others in the court system. It is noteworthy that two-thirds of the stakeholders (N=25 of 38, 66%) disagreed or strongly disagreed that SRLs were upset or angered at receiving the assistance of the duty lawyer.

Table 38 Stakeholders' views on priority

Question 21: To which proceedings should the duty lawyer give priority?						
Option	Very Important	Important	Neither	Of little importance	Not Important	Count
Children's matters	19	10	1	0	0	30
Property matters	1	19	8	2	0	30
Matters involving family violence	20	10	1	0	0	31
Any urgent Interim Applications	21	10	0	0	0	31
All the above	7	5	3	0	0	15
Answered						38
Provided Comment						3

Question 21 asked about the nature of proceedings in which stakeholders thought the duty lawyer could make a contribution. Stakeholders made multiple choices but overwhelmingly identified as ‘very important’ or ‘important’ that the duty lawyer assist in matters where there is family violence (N=30 of 38). Thirty-one said it was either ‘very important’ or ‘important’ that the duty lawyer assist SRLs at urgent interim hearings, and the same number identified children’s matters as ‘important’ or ‘very important’. Involvement in both children’s matters (N=29 of 38, 76%) and where there was family violence (N= 30 of 38, 78%) was considered ‘very important’ or ‘important’ by the majority of stakeholders. This confirms research that people who experience family violence are vulnerable SRLs who are disadvantaged if they do not receive legal assistance²⁶⁹ and that properly targeted duty lawyer schemes reduce barriers to justice.²⁷⁰

There was some support for the view that the duty lawyer should assist SRLs in property matters, with only one respondent considering it ‘very important’ while half (N=19 of 38, 50%) said it was ‘important’ and a quarter (N=10 of 38, 26%) said it was ‘neither important’ or ‘of little importance’.

Three comments were provided. A family law practitioner who selected children’s matters and matters involving family violence as ‘very important’ concluded:

[a]ny matter in which a person appears to be at a particular disadvantage — through not understanding the system, lack of functional literacy, or where there is violence and abuse. Also, particularly where the effect of the proposed Orders is especially severe or long-term, or the application is unusual or the process complex.²⁷¹

One of the court’s registry staff opined:

Property is a difficult one. On the one hand, if property is in dispute, why should public resources be used to resolve the issue. A user pays principle. On the

²⁶⁹ See Chapter 1: E (v) Family Law Reforms; Chapter 2, 5.B.5 Productivity Commission, above n 12 citing VicLA Final Report, 24; Macfarlane, above n 28, 90.

²⁷⁰ See Chapter 2, 5.B.5 Productivity Commission, above n 12, 6 noting that disadvantaged people faced significant barriers in dealing with legal disputes, fn 14; also see Allen Consulting, above n 192, 43.

²⁷¹ Stakeholder 25.

other hand, where a client is in a vulnerable position, say due to FV and is at risk of losing out on what they may be entitled [to], why couldn't they have access to free legal assistance?²⁷²

Table 39 Stakeholders' views on the importance of a relationship with the duty lawyer

Question 24: How important to you is a good relationship with the duty lawyer?			
Option	Stakeholders	Response Count	N=38
Very important	4; 6; 7; 9; 12; 13; 14; 15; 17; 18; 22; 25; 32; 33; 34; 37; 38	17	45%
Important	2; 3; 5; 8; 10; 11; 16; 19; 20; 21; 24; 26; 27; 29; 30; 31; 35; 36	18	47%
Neither important nor unimportant	1; 23; 28	3	8%
Of little importance		0	0%
Not at all important		0	0%
Other		0	0%
Answered		38	100%
Provided Comment		4	

Question 24 was intended to link the use stakeholders made of the service with previous questions on how they viewed the performance of the duty lawyer²⁷³ and the nature of their relationship with the duty lawyer. The question also sought to connect responses to Questions 8, 9, 15 and 16, asking whether stakeholders referred SRLs to the duty lawyer and if so, how many and if not, why not. It was considered that if there was a good relationship between the stakeholders and the duty lawyer (whereby each knew the other's expectations), this would enhance the efficiency of the service and enhance justice for SRLs. This was also explored in the interviews with judicial officers and the implications are considered in the next chapter.

Most stakeholders (N=35 of 38, 92%) said that they thought it 'very important' or 'important' that they had a good relationship with the duty lawyer. While three were neutral, not one respondent said that a good relationship with the duty lawyer was of little or no importance. This result is also shown in Table 40, which provides a clear picture of the strength of responses.

A concise comment by a member of the court staff represents the sentiment expressed in the other comments to this question:

²⁷² Stakeholder 12.

²⁷³ See responses to Questions 11–13 inclusive and Question 23.

The duty lawyer provides assistance with the smooth running of the court, especially in duty lists.²⁷⁴

3 RQ3: What is the impact of the Scheme on SRLs and other key participants in the family law system?

Stakeholders were not directly asked to identify the impact of SRLs on them personally. This may be a weakness in the survey, given that it was put to the other participants. It was considered that stakeholders' responses to other questions in this survey revealed their views of the impact the Scheme had on them at a working level without having to ask directly.

Stakeholders who were ICLs were asked to comment on their role when SRLs are involved in their matter, given that they are coming under increasing pressure to assist SRLs.

(a) What is the impact of the Scheme on the Independent Children's Lawyer?

Table 40 ICLs' views on the impact of SRLs

Question 18: If you are an ICL and either one or both parties are unrepresented, does the judge ask you to assist the SRLs?			
Option	Stakeholders	Response Count	N=9
Always	23; 37	2	
Nearly always	17	1	
Some of the time	4; 29; 35	3	
Rarely	28	1	
Never		0	
Other	31; 34	2	
Answered		9	
Not answered		29	
Provided Comment	21; 34	2	

This question was designed to elicit data from ICLs about the impact of SRLs on their practice. It was also hoped to illustrate to ICLs that a duty lawyer may be able to assist in circumstances when the other party was represented or where neither party was represented and the ICL may be the only legal practitioner involved in the matter.

²⁷⁴ Stakeholder 21.

It may appear that a small number of ICLs (N=9) participated in the survey, but there are only 23 registered with LACT as available for appointment. It was surprising that other stakeholders elected to answer this question. Some explained that they were not ICLs but, as court staff, observed that the 'judge almost always asks the ICL to assist SRLs'²⁷⁵ and that 'the ICL often is called upon to assist SRLs'.²⁷⁶

It was interesting that all ICLs were called upon to assist at some time and that only one stakeholder said they had rarely been asked. Not a single stakeholder who was an ICL said they had never been called upon. Illustrative of what effect this had on ICLs was this comment:

This is a real problem, in that either an SRL or a represented party very easily reaches the conclusion that the ICL is biased. If this happens in the early stages, it can cause significant problems and expense.²⁷⁷

Table 41 Stakeholders' perception of whether a duty lawyer should be available to assist SRL when ICL is involved

Question 19: Should a duty lawyer always be available to assist when both parties are unrepresented and the ICL is the only legal professional?			
Option	Stakeholders	Response Count	N=38
Yes	4; 5; 6; 7; 8; 11; 17; 18; 25; 26; 29; 33; 35; 37; 38	15	40%
No	1; 2; 3; 10; 12; 13; 21; 22; 24; 27; 28; 30; 31; 32; 34	15	40%
No opinion		8	21%
Answered		38	100%
Provided Comment		2	5.2%

This question sought to determine whether ICLs thought there was a benefit in having the duty lawyer assist them, but also to see if there was any recognition that this might place stress on the duty lawyer. Although nearly half (N=18 of 38, 47%) said that they would like the duty lawyer to be available, the same number disagreed and eight (N=8 of 38, 21%) had no opinion. An ICL said:

²⁷⁵ Stakeholder 21.

²⁷⁶ Stakeholder 34.

²⁷⁷ Stakeholder 25.

This needs to be tempered with 'if necessary'. There will be an overloading of DS work if the population thought they could access legal advice and representation for free for the entirety of their legal process. Whilst I don't like limits on DS assistance, there needs to be protection from those who abuse the system.²⁷⁸

Two court staff commented on this issue:

Adding further roles to the duty lawyer would push it more towards a Free Lawyer than a duty lawyer. It is better to provide as many people with assistance as possible, and due to inevitable funding constraints, the number of people whom they could assist will decrease as their involvement becomes more complex.²⁷⁹

Each case may require an intervention at a different stage. There are many cases where when the intervention comes early, SRLs can develop a realistic expectation of their case. Other times, assistance at the first and possibly subsequent court appearance can be of the most assistance.²⁸⁰

(b) How should the duty lawyer prioritise the delivery of the service?

Table 42 Stakeholders' views on priority when allegations of family violence involved

Question 22: Whom should the duty lawyer assist when there are allegations of family violence			
Option	Stakeholders	Response Count	N=38
The alleged victim	2; 5; 6; 10; 17; 22; 33; 36	8	21%
The alleged perpetrator	35	1	3%
Whoever approaches the duty lawyer first	1; 3; 4; 7; 8; 9; 11; 15; 18; 19; 23; 24; 28; 34	14	37%
Whoever the judge directs the duty lawyer to assist	14; 20; 21; 26; 27; 29; 37	7	18%
Other	12; 13; 16; 25; 30; 31; 32; 38	8	21%
Answered		38	100%
Provided Comment		13	34%

There is a significant body of research showing the complexity of issues and challenges involved in providing legal assistance to a 'high need' victim of family

²⁷⁸ Stakeholder 31.

²⁷⁹ Stakeholder 21.

²⁸⁰ Stakeholder 12.

violence.²⁸¹ In an attempt to understand what impact the duty lawyer may have in circumstances where there are allegations of family violence, stakeholders were asked to nominate whom the duty lawyer should assist as a priority. It was clear that a substantial number (N=14 of 38, 37%) of stakeholders thought the duty lawyer should provide assistance on a 'first come first served' basis. One family lawyer wrote:

This is difficult to answer, both potentially need assistance and neither should be given priority. It may be a case of first in.²⁸²

There was some support for the alleged victim receiving advice, but one selected the perpetrator as a priority and gave this reason:

The victim of FV should have continuing representation, not a duty lawyer service. Given that, the duty lawyer should assist the offender. However, as a matter of practicality, it is not always possible to determine who needs the assistance. A Judicial Officer may be able to see from the bench who appears to need assistance with something, so in some cases, that may help.²⁸³

This question attracted a significant number of comments, mainly along the lines that 'both could be assisted',²⁸⁴ both 'ought to have equal opportunity'²⁸⁵ and 'allegations of family violence should have no impact on the person to whom the duty lawyer provides assistance. Ideally, each litigant should be afforded the same legal assistance'.²⁸⁶ This level of response may indicate that stakeholders were acutely aware of the problems faced by people involved in family violence, and needed to voice their opinion beyond the options provided. One family lawyer left it to the judge, linking the issue to procedural fairness:

²⁸¹ See Chapter I: E (v) Family law reforms and Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (2009) Melbourne: Australian Institute of Family Studies, (Kaspiew et al 2009) where this is discussed in greater detail; also see Allen Consulting, above n 192, 11 and 43.

²⁸² Stakeholder 27.

²⁸³ Stakeholder 25.

²⁸⁴ Stakeholder 32.

²⁸⁵ Stakeholder 31.

²⁸⁶ Stakeholder 12.

A judicial direction is probably the only way to solve this dilemma without raising issues of procedural fairness.²⁸⁷

A member of the court staff thought that it was the duty lawyer's job to prioritise whom they attend to, based on how urgent the matter was, how much time the duty lawyer had to attend to it, and other matters.²⁸⁸

4 RQ4: What improvements could be made to the Scheme to better deliver the duty lawyer service?

Table 43: Stakeholders' suggestions for improvements to the Scheme

Question 26: In your opinion, how can the Family Law Duty Lawyer Scheme be improved?			
Option	Stakeholders	Response Count	N=38
Answered	1; 3; 5; 11; 12; 14; 17; 18; 21; 22; 25 ;27; 30; 31; 32; 33; 34; 36	19	50%
Did Not Answer	2; 4; 7; 8; 9; 10; 13; 15; 16; 19; 20; 23; 24; 26; 28; 29; 35; 37; 38	19	50%

Stakeholders were asked how the Scheme could be improved. It was considered that by the time stakeholders had reached Question 26, they would have reached an opinion about the workings of the Scheme by answering the survey questions and might have valuable suggestions about how the service could be improved. The question did not provide any answer options; it was designed to generate written comments which might illustrate stakeholders' needs or concerns which were not being met by the Scheme and might not have been addressed elsewhere in the survey. Only half (N=19 of 38) of stakeholders responded to this question.

The majority of the comments were from family law practitioners, some of whom were ICLs (N=10 of 38, 26%), although a significant number were from court staff (N=8 of 38, 21%).

The themes of the suggestions made by the stakeholders were that:

- There should be more duty lawyers providing additional services in a flexible timeframe;

²⁸⁷ Stakeholder 21.

²⁸⁸ Stakeholder 16.

- The Scheme needed to adapt to changing needs and provide legal assistance services beyond the day an SRL's matter is in court; and
- The duty lawyer should be better promoted and advertised among legal and non-legal professionals.

Stakeholders' qualitative responses are discussed in Chapter V, which identifies areas of concern; Chapter VI makes recommendations for appropriate policy and practice reform.

The survey of stakeholders established that they place a high value on their relationship with, and the services provided by, duty lawyers. They recognised access to justice was an issue of equity rather than of equality. The majority view was that SRLs should receive advice and assistance from the duty lawyer to redress any barriers or unfairness they might confront in the court system; however, that access should not be unfettered.

In general, the principle of the duty lawyer being able to offer assistance on only one occasion and for a limited time was considered too restrictive. Stakeholders wanted the duty lawyer to be involved at different stages of the proceedings and for longer periods than on the day an SRL's matter was in court. On the other hand, they were clear that SRLs should not receive continuous assistance. It may be a weakness in this study that stakeholders were not asked to explain whether they were concerned about the additional expense to legal aid which would mean less work for the legal profession or that they did not believe that SRLs really can't obtain affordable services. On the whole, the common view was that the service should be provided to SRLs before court in recognition that the earlier an SRL receives assistance the more quickly their matter will proceed through the court and the greater the opportunities for settlement.

Stakeholders placed more importance on the duty lawyer's assistance to SRLs with regard to the efficiency of court processes than on the benefits it might provide SRLs. This priority was also reflected in stakeholders not linking SRLs getting the outcome they wanted to their getting access to justice: rather, stakeholders considered it important that SRLs receive fair treatment. This

suggests that stakeholders think the main purpose of the duty lawyer service is to help the system, not SRLs.

Family law practitioners said significant benefits accrued when the duty lawyer assisted SRLs in negotiations. This view confirmed comments made by the judges that matters either progress more quickly through the court or settle if a duty lawyer is involved.

ICLs identified a concern that their role was becoming harder as they were more often called upon by judges to assist SRLs. They suggested that the duty lawyer's intervention would take some stress from them and avoid allegations by SRLs of bias.

Some stakeholders thought that more and better information should be provided to SRLs and stakeholders on when and where the duty lawyer is available and what services they could provide.

E Conclusion

Many stakeholders provided multiple answers to multiple response questions. These responses were not ranked.

Stakeholders acknowledged the widespread benefits of the Scheme for everyone involved in the family law system. All the legal professionals and court staff indicated that they saw the Scheme as providing services to SRLs who were not eligible for legal aid but, more importantly, as improving the efficiency of the court.

The legal professionals recognised that self-representation has a substantial impact on everyone involved, and that SRLs considered they were at a disadvantage and needed more help from the duty lawyer to address the range of problems encountered in court proceedings. There was a strong need for expanded duty lawyer services and/or more duty lawyers providing those services before an SRL's matter was in court and at different stages of the proceedings, although this service should not be ongoing. The matters which all

participants considered should be given priority by the duty lawyer were children's matters, family violence and urgent interim applications.

One obvious question which should have been asked of stakeholders was how they would rank the relative importance of the services that might be provided to SRLs, for example, mediation, the 'unbundled' services provided by QPILCH but without representation, more grants of legal aid or duty lawyer services. If the answer had been more duty lawyer services, it would have been easier to conclude that the participants in the study saw duty lawyer services as preferable and vital. However, even though there was no choice made by stakeholders, the researcher considers the research and findings rank duty lawyer services as important and that they help the family law system function more efficiently.

All stakeholders acknowledged the importance of having a good relationship with the duty lawyer. An overwhelming majority of stakeholders recognised the difficulties of operating under the time constraints imposed by busy duty lists. It was suggested that the service operate beyond duty list days to reduce stress on SRLs and relieve pressure on all those involved in the duty lists who had SRLs on the other side of their matter.

On the whole, participants in this study valued the service provided by the duty lawyer but were concerned that increased demand was not being met by the current arrangements. These results are discussed and interpreted in Chapter V, which draws together all of the data.

Chapter Five

Discussion: Analysis of Results

A Introduction

Chapter IV presented the results of the empirical research. This chapter analyses the results in the context of the literature and explains how they answer the research questions. It explores common themes which arose and discusses how the results are in keeping with previous research but may be different between each category of participant.

The sections are organised by examining the results against the research questions and the themes which arose from analysis of the responses.

5.1 RQ1: How does the Family Law Duty Lawyer Scheme provide access to justice for SRLs?

The first research question sought to explore whether the underlying theme in the literature that the Scheme increases access to justice was confirmed by the views of participants on how it worked in practice. Responses suggested that the duty lawyer assistance enhances access to justice for SRLs in a number of ways, including:

- providing SRLs with a free legal service offering information about the legal system, advice on their matter and an opinion on the merits of their claim which gives them an understanding they otherwise may not have;¹
- offering SRLs a face-to-face service to make the SRL's court experience less confronting and impersonal;²
- assisting SRLs to draft simple documents to ensure their matter is clearly presented to and understood by the court;³

¹ 'Wanted procedural advice'.

² 'I felt better'.

- offering limited representation to SRLs who are not eligible for legal aid or who cannot afford the costs of litigation;
- representing SRLs in court and ensuring their matter proceeds more quickly;⁴
- helping SRLs in negotiations with the other party's lawyer, resulting in better outcomes;⁵
- helping SRLs pursue their legitimate problems through the courts and diverting unmeritorious matters from the system;⁶ and
- referring SRLs to alternative dispute resolution services to assist SRLs with other aspects of their problem.⁷

The Scheme represents an additional service to SRLs to resolve their dispute beyond having their day in court. By better informing and preparing SRLs about the process and relevant issues affecting their matter, the involvement of the duty lawyer reduces the significant barriers to justice faced by SRLs in the family law system by improving their access to, and experience with, the court.

In order for the Scheme to be effective, SRLs need to be aware it exists and the duty lawyer needs to be a visible presence in the courts. In this study, insufficient information on the Scheme was identified as a major barrier to

³ See Chapter IV: Part I: B.I.A: 1 for discussion on what SRLs said about needing help with documents. Also see Table 14: 12 of 14 SRLs said they received help with filling documents; Table 15 where half of SRLs who had not seen a duty lawyer said they would have liked help with all services, including filling documents; Table 37 where all except one stakeholder said they thought the duty lawyer's assisting SRLs with documents was 'very important' or 'important'; Comments of the researcher and LDL about SRLs' needing help with forms. All the judges interviewed considered SRLs benefited from the duty lawyer's assistance in drafting documents see Chapter IV: B Part 2: (iv).

⁴ Ibid Table 10, Question 11 where 7 of 14 of SRLs who had the assistance of the duty lawyer thought their matter proceeded more quickly through the courts. Judge 3 commented that matters proceeded more quickly when the duty lawyer assisted an SRL in court. Also see Table 34, Question 10 where the majority of stakeholders indicated that it was 'very important' or 'important' that the duty lawyer help the court system run more efficiently and effectively.

⁵ Ibid Question 12, where 11 of 14 of SRLs who had been assisted by the duty lawyer thought they got a better outcome.

⁶ See Chapter IV: Part III: C: Table 34 where almost all stakeholders thought that one of the key purposes of the duty lawyer service was to provide SRLs with a 'reality check' on the merits of their matter. By contrast, SRLs said they would not be deterred from proceeding even if they were told that their matter lacked merit. Most said they would seek a second opinion.

⁷ Chapter IV: Part I: B.I.A: Table 16 indicates that not one SRL considered they would attend mediation if the duty lawyer indicated their matter lacked merit and offered this as an alternate way of resolving their dispute.

access to justice for SRLs.⁸ The majority of SRL respondents had not accessed the duty lawyer service⁹ but said they would have used it if they had known.¹⁰ Even those who knew about the service did not fully understand its scope and role, assuming that the duty lawyer could assist with all aspects of their litigation and follow it through even after the court event by explaining the outcome.¹¹ In the majority of cases, SRLs who had known about and used the service found out about it through court staff.¹² The fact that none indicated they found out about the service through the internet is consistent with research which cautions service providers from relying too heavily on internet and self-help services.¹³ This may particularly be the case in Tasmania which has low rates of literacy.¹⁴

While it may be understandable that SRLs did not know about the Scheme and how the duty lawyer service operates, it was interesting to note why the stakeholders felt the service was not well known and why some of the initiatives put in place as part of the action research might not have had the expected effect of promoting the service.¹⁵ For example, it is difficult to understand why eight family lawyers had not noticed the signs around the court or the brochures in the registry, or heard the announcements prior to the duty list.¹⁶ It was helpful

⁸ Chapter IV: Part III: D: Table 26 Question 5 where stakeholders commented that there was insufficient signage or publication of the duty lawyer's services and availability; Stakeholder 19. Also Table 33, Question 25, 29% of stakeholders thought there was insufficient information about what the duty lawyer does.

⁹ Chapter IV: Part I: B.I.A: which shows that of the 30 respondents to the survey, 16 SRLs did not know about the duty lawyer and had not accessed the service.

¹⁰ Ibid Table 8, Question 19 where 12 of 14 SRLs who did not know about the duty lawyer service said they would have used it had they known.

¹¹ Ibid Table 3, Question 22 where 14 of 16 of SRLs said they would have benefited most from seeing the duty lawyer before the commencement of proceedings.

¹² Ibid Table 7, Question 9 asking how SRLs found out about the duty lawyer, with 5 of 14 SRLs indicating through court staff and 4 of 14 through legal aid.

¹³ Jeff Giddings and Michael Robertson, "Informed Litigants with Nowhere to Go": Self-Help Legal Aid Services in Australia' [2001] 26(4) *Alternative Law Journal* 184-190; Merran Lawler, Jeff Giddings and Michael Robertson, "Maybe a Solicitor Needs to Know that Sort of Thing but I Don't": User Perspectives on the Utility of Legal Aid Self-Help Resources' in Alexy Buck, Pascoe Pleasence and Nigel Balmer (eds), *Reaching Further: Innovation, Access and Quality in Legal Services I* (Stationery Office, London 2009), 26.

¹⁴ Chapter IV: Part I: B.I.A. Also see fn 50 for 2007-08 National Health Survey statistics and ABS figures identifying that almost half of the Tasmanian population cannot read beyond the headlines in a newspaper.

¹⁵ Chapter IV: Part I: B.I.A: Table 27, Question 6 asked stakeholders to nominate why they thought the duty lawyer may not be visible.

¹⁶ Ibid.

to note that five stakeholders thought that the duty lawyer should wear identification; this may be worth considering.¹⁷

The importance of this finding is the acknowledgement that the underlying principle that the Scheme provides access to justice cannot be sustained unless people who might use the Scheme know it exists and what it does. Meaningful improvements in promoting the duty lawyer services cannot be successful unless they are accompanied by a campaign to raise awareness about the Scheme; and beyond that, the Scheme must undergo significant change to provide greater access to justice to SRLs.¹⁸

(a) A level playing field for SRLs

One of the issues when looking at access to justice is to consider ‘the fairness of the legal process facilitated by the court’.¹⁹ The image often used when describing a dispute where one party is represented and the other is not is whether this creates a level playing field. The Full Court in *Re F* indicated that ‘it is simply not possible to create a level playing field where one party is represented by a professional and the other is not’.²⁰ Justice Faulks commented that ‘the “playing field” of litigation is never truly level, even when both parties are represented’,²¹ but acknowledged that ‘the field is more markedly uneven in cases where a lay-person is on one side and a qualified practitioner is on the other’.²² The Productivity Commission’s report noted that duty lawyers can

¹⁷ See Chapter VI: Conclusions and Recommendations.

¹⁸ Trevor Farrow, Diana Lowe, Martha Simmons, Bradley Albrecht and Heather Manweiller, ‘Addressing the Needs of Self-Represented Litigants in the Canadian Justice System’ (A White Paper Prepared for the Association of Canadian Court Administrators’ Toronto and Edmonton 2012), 83. Farrow et al state the importance of service providers themselves being knowledgeable about services available for SRLs, to help meet their needs and increase their access to legal advice and representation.

¹⁹ John Faulks, ‘Self-Represented Litigants: Tackling the Challenge’ (Paper presented at the Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013), 4, citing Justice Richard Stewart, ‘The Self-Represented Litigant: A Challenge to Justice’ (2011) 20(3) *Journal of Judicial Administration* 146, 155.

²⁰ *Ibid.* Also see *Re F: Litigants in Person Guidelines* [2001] FamCA 348 [136] where the Full Court citing *Johnson* said that ‘a judge has a duty to so far as possible provide a “level playing field” for litigants in person’. Also see Chapter I: E Meeting the needs of SRLs.

²¹ Faulks, above n 19, 4.

²² *Ibid.*

‘assist in levelling the playing field between parties with unequal resources, and their use may increase the prospects of settlement’.²³

The judges said that they considered that the intervention of the duty lawyer provided SRLs with fundamental fairness and allowed them to maintain order in the court. The general comment by family lawyers was that access to justice for SRLs meant having fair access to legal services,²⁴ and that if a duty lawyer is on the other side, matters progress more quickly and smoothly. However, the results from both judges and stakeholders reinforce the duty lawyers’ view that a once-only appearance does not completely level the playing field for SRLs.²⁵

The Scheme is the half-way house for SRLs between no representation and full representation. It provides access to legal advice and representation and fills the gap for vulnerable people by giving them practical guidance through the court system. Such assistance at key stages of a dispute may result in the SRLs continuing the matter themselves.

One of the issues raised by seeing the Scheme as filling the gap is that it provides an excuse for a government not to increase funding to Legal Aid Commissions to provide full representation. The results clearly indicate that the duty lawyer’s intervention helps the system to function more efficiently but that more could be done to help SRLs.

Stakeholders acknowledge that SRLs are typically disadvantaged in the family law system and that providing them with competent assistance by a duty lawyer at an early stage of the court process goes some way to addressing this. The responses from judges and stakeholders also indicate support for duty lawyer services to be offered beyond the confines of the court. This is in line with

²³ Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1, 495 (‘Productivity Commission’).

²⁴ Chapter IV: Part III: D: Table 22, Question 17 asking stakeholders what ‘access to justice’ means: 73% said ‘right to a fair hearing’ and 63% said ‘legal advice (short of representation)’.

²⁵ Chapter IV: Part I: B.I.B: Interview: Judge I; also see Faulks, above n 19.

research recommending an expansion of the role of the duty lawyer to offer discrete tasks and representation and ‘unbundled’ services.²⁶

The traditional duty lawyer Scheme has been described as an ‘emergency room’²⁷ model. One judge used a number of medical analogies to explain how the Scheme fitted into the family law system. A similar metaphor was used by Forell in assessing the concept of early intervention: is it better ‘to have a fence at the top of the cliff than a fleet of ambulances at the bottom’?²⁸ Extending the analogy, it may be that the duty lawyer is the safety barrier, quickly assessing each SRL’s problem, providing them with assistance and referring them to appropriate services.²⁹

A triage system was introduced at the Monday lunchtime clinics at the family courts,³⁰ as part of the action research.³¹ The notion of the duty lawyer as an experienced assessor of problems at an early stage and directing SRLs accordingly is reflected in the manner in which the EIU duty lawyers work to assign degrees of urgency to a matter and decide how and where it should progress. However, duty lawyers do more than that: they make it possible for SRLs to access information and advice in a quantifiable way.³² Ensuring that the SRL knows what they have to do, how to do it, and where to go for further assistance enhances court efficiency ‘through the quality of the advice and representation duty lawyers provide’.³³ The duty lawyer adds value to this service by going beyond the simple provision of advice.

²⁶ Productivity Commission, above n 23, vol 2, 804–5.

²⁷ Productivity Commission, above n 23, vol 1, 515, citing QPILCH Submission DR 247.

²⁸ Suzie Forell, ‘Is Early Intervention Timely?’ *Justice Issues*, Paper 20 (Law and Justice Foundation of NSW, 2015), 1-13.

²⁹ Chapter IV: Part I: B.I.C: Results from the Duty Lawyers where the Hobart Duty Lawyer notes that SRLs are often ‘emotional and even angry’; also see fns 137 and 138.

³⁰ Chapter IV: Part I: B.I.A: (d) (i) and Part II: 3 (d).

³¹ Chapter IV: Part II: C: Impact of action research on the study.

³² PricewaterhouseCoopers, (‘PwC’) ‘Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism’ (November 2009) (‘Legal Aid Funding’); Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions* (2014) (‘Allen Consulting’). This report found that it would cost Legal Aid Commissions an additional 5% of their budget if duty lawyers did not provide services in the family courts.

³³ *Ibid.*

(b) Court services SRLs accessed or attended

In Tasmania, both the FCA and FCC are in the same buildings,³⁴ and almost everyone anecdotally refers to the ‘family court’, which can be confusing. Most matters commence in the FCC and, therefore, most SRLs are introduced into the family law system through the FCC. There may be occasions when SRLs come before a Registrar of the FCA in relation to divorce matters or Conciliation Conferences involving property disputes. If SRLs had not commenced proceedings or were at the application or response stage, which is the first return date, they would likely have come into contact with the services of the FCC.³⁵ This result is supported by the responses to Question 13 where not one SRL said they felt rushed or pushed by a judge of the FCA. It is unlikely that their matter would have come before such a judge; it may have come before the Registrar, as is suggested by one SRL indicating they felt ‘rushed or pushed’ towards settlement by a Registrar.³⁶ This SRL also selected other persons on the list, except for the Family Consultant and the duty lawyer.³⁷

Any confusion SRLs may have about which court they attended is not materially relevant, except in so far as it is one more complicating factor for SRLs who would not be expected to know what applications should be filed in which court. An important part of the duty lawyer’s assistance at an early stage is identifying what applications should be filed in the FCC and, more importantly, identifying the more complex matters which should be filed in the FCA.³⁸

³⁴ This is the case both in Hobart and Launceston.

³⁵ Federal Circuit Court of Australia, *Annual Report 2014–2015* (2015), see Workload: Table 3.3 in this report: Family Law and general federal law applications filed 2014–15 show that a total of 86,380 matters proceeded through the FCC, which represents 91% of all FCC matters, <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/annual-reports/2014+-+15/2014-15-annual-report-part3>>.

³⁶ Chapter IV: Part I: B.I.A: Table 18 Question 13 where 10 of 14 SRLs said they did not feel rushed or pushed towards settlement and 2 of 14 said they did.

³⁷ Ibid Table 19 Question 14 asked SRLs to identify who rushed or pushed them. Not one person selected the duty lawyer.

³⁸ This aspect is discussed under the research question addressing the purpose and nature of the duty lawyer role.

(c) Nature of the SRL's dispute

The majority of SRLs had a dispute about children (N=17 of 30) which, when taken into account with the proportion who had both children and property matters (N=6 of 30), confirms the statistics in the most recent Annual Reports of the FCA and FCC that show that the majority of matters which come before them are children's disputes or children and financial disputes.³⁹

One of the judges considered that the impact on SRLs was most profound when the dispute was about children and noted the benefits of the duty lawyer seeing people outside the 'strange environment' of the court.⁴⁰ The researcher recognised the strain on SRLs of appearing in court and preferred to deal with them in the Monday clinics 'when they were more emotionally and intellectually prepared to listen'.⁴¹

The relevance of this result is that prior research has shown that SRLs involved in children's matters experience a range of emotions which cloud their objectivity.⁴² The results from SRLs revealing that they had difficulty in

³⁹ Federal Circuit Court of Australia, *Annual Report 2014–15* (2015) shows 54% seeking orders for children and 11% seeking orders for children and financial compare; Family Court of Australia, *Annual Report 2014–2015* which has 30% parenting, 13% parenting and financial and 55% financial. The FCA has a greater percentage of financial matters because there was a cap on FCC applications (\$750,000). Property matters with a value exceeding that cap are litigated in the FCA.

⁴⁰ Chapter IV: Part 1: B.1.B: Interview: Judge 2.

⁴¹ Chapter IV: Part I: B.I.C: Comments: researcher.

⁴² See Chapter I: H (i) Other duty lawyer schemes, fn 301 where Clare Huntington refers to the 'negative emotional input of family law litigation', particularly in children's disputes and (ii) (c), fn 412 where Macfarlane refers to SRL's emotional involvement having a negative impact on SRLs, Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013); also see Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey 'Legal Australia-Wide Survey: Legal Need in Australia—Access to Justice and Legal Needs', (Law and Justice Foundation of New South Wales, Sydney 2012 ('Coumarelos et al 2012'); Bill Eddy, *High Conflict People in Legal Disputes* (HCI Press 2009). The Eddy study looks at figures for persons suffering from a personality disorder who are involved in 'high conflict behaviour' in the United States is more than 14% and another 10% have 'maladaptive personality traits.' The Eddy study suggests that 'while many people with mental health issues may be able to represent themselves successfully ... (some) may be more likely to be involved in conflict and be less able to negotiate agreed outcomes' and that it is 'less likely (SRLs) can ... engage in a positive, constructive or rational way in other court-related interactions,' 8; also see Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants—The Dark Side', (2014) *Access to Justice*, Paper 32,

accepting the duty lawyer's advice about the merits of their matter is indicative that they may be unrealistic in assessing their own case and their ability to deal with it through the court.

(d) Early intervention

One of the philosophical assumptions behind the Scheme was that it should act as an early intervention strategy. Diversion of matters from the court would conserve court resources, present a less adversarial approach to resolving the dispute⁴³ and help prevent SRLs' issues becoming more complex. Many studies stress the importance of early intervention to provide SRLs with a range of services which may resolve matters before they escalate.⁴⁴ The issue of when SRLs would most benefit from assistance has been a theme in examining the relationship between the limited availability of legal aid funding and SRLs appearing in ever greater numbers in the family courts.⁴⁵ The general principle

<<http://www.civiljustice.info/access/32>>. Sourdin and Wallace cite an Australian Mental Health Study in 2007 which suggests that the figure in Australia for persons with a personality or 'other maladaptive personality traits' was 20%, 3.

⁴³ Senate Legal and Constitutional Affairs References Committee *Inquiry into Legal Aid and Access to Justice* (Final Report 2004); Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia', (Research Report, Law and Justice Foundation of NSW 2002), cited in Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Report by the Access to Justice Taskforce Attorney-General's Department, Commonwealth of Australia, (2009), 43; Coumarelos et al 2012, above n 42; Productivity Commission, above n 23, vol 1; PwC, Legal Aid Funding, above n 32.

⁴⁴ Forell, above n 28, 63; Suzie Forell and Michael Cain, 'An Evaluation of LANSW's Family Law Early Intervention Unit Duty Lawyer Service', (Law and Justice Foundation of New South Wales, November 2012). The EIU Evaluation had as Research Question 6: Is the EIU duty service an early intervention strategy?; also see Allen Consulting, above n 32; Productivity Commission, above n 23, vol 1, 495, iv; PwC, Legal Aid Funding, above n 32.

⁴⁵ See Chapter I: (i) History of legal aid funding and (ii) Effects of legal aid funding cuts on the courts; Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants' (Research Report No 19, Family Court of Australia, 1999); Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000), 81; John Dewar, Barry Smith and Cate Banks, 'Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia' (Research Report No 20, Family Court of Australia, 2000); Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000); Rosemary Hunter, Ann Genovese, April Chrzanowski and Carolyn Morris, 'The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia' (Research Report, Law and Justice Foundation August 2002), 178 (Hunter et al). Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999), 334–5. This review found that early assistance 'can help cases to resolve early and to identify and decipher issues'.

underpinning the Scheme was that it would have 'more effect if advice were provided to SRLs before [their] day of court'.⁴⁶

The guidelines under which the Scheme operates in the National Protocol allow the duty lawyer some flexibility⁴⁷ and discretion as to when they see an SRL and in what circumstances.⁴⁸ It was of interest to determine what the participants considered to be the best time for the duty lawyer to assist SRLs. SRLs who had not seen a duty lawyer overwhelmingly said that they wanted assistance before attending court, 'as early as possible'. This is not surprising. It confirms comments in the literature about the stress and disadvantage suffered by SRLs⁴⁹ confronted with 'a scary environment'.⁵⁰ The duty lawyers similarly considered the court event was stressful for an SRL and preferred to attend to SRLs before they filed proceedings.⁵¹

Some SRLs indicated they wanted representation in court (N=7 of 16), which is supported by the literature which suggests that SRLs are likely to be disadvantaged in court in the adversarial system.⁵² A quarter of SRLs who had

⁴⁶ Australian Law Reform Commission, *Managing Justice*, *ibid*; Coumarelos et al 2012, above n 42; Council of Australian Governments 2010, *National Partnership Agreement on Legal Assistance Services* ('COAG'), Canberra, <<http://www.nationallegalaid.org/assets/General-Policies-and-Papers/NPA-Signed-Agreement.pdf>>; Productivity Commission, above n 23, vol 1; Allen Consulting, above n 32; Forell, above n 28; Forell and Cain, above n 44.

⁴⁷ Commonwealth Attorney-General's Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme National* ('Protocol') (2007) <<http://www.aph.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subld=206418>>, see section [3.2] 'Assistance will normally be provided on one occasion only'.

⁴⁸ *Ibid* [2.3] 'Assistance [of the duty lawyer is] subject to the discretion and availability of the duty lawyer'.

⁴⁹ Senate Legal and Constitutional Affairs References Committee, above n 43, see Chapter 10: Self-Represented Litigants, [10.75] citing LANSW, Submission 91, 30–31 <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/report/contents>.

⁵⁰ Chapter IV: Part I: Interview: Judge 2.

⁵¹ Chapter IV: Part I: B.I.C: Comments: researcher and Interview: LDL.

⁵² Australian Law Reform Commission, *The Unrepresented Party*, Adversarial Background Paper 4, Australian Law Reform Commission, (December 1996); Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System', Research Report (February 2004) ('Erosion'); Melanie Dye, 'An Evaluation of Services for Self-Represented Litigants in the Federal Magistrates Court' (Federal Magistrates Court of Australia, October 2004); Melissa Smith, Esther Banbury and Su-Wuen Ong, *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, New Zealand, July 2009).

not seen the duty lawyer (N=4 of 16) said they wanted assistance after court as well, to explain the outcome. Some who selected this plus the other two options thought they needed help at every stage, suggesting that they did not know the difference between duty lawyer services and full representation. On the other hand, it may be that SRLs at this stage do not know what they need and so would like help with everything.

SRLs were asked whether they would consider other options to litigation if the duty lawyer's advice was that their matter lacked merit. Although mediation was offered as a choice, not one respondent selected it. The duty lawyers commented on the advantages they consider mediation offers, but also on the difficulties SRLs may have in accepting this option.⁵³ It may be, as Hunter suggests, that SRLs are more aggressive than lawyers in pursuing their dispute and not inclined to believe in an alternative resolution process;⁵⁴ or that mediation has failed them in the past.

Regardless of whether SRLs agreed to attend mediation prior to seeking legal advice, the duty lawyers made it clear that they advised SRLs about its benefits and encouraged them to 'take one step back'⁵⁵ with a view to achieving a result agreeable to both parties.⁵⁶ However, the results indicate that not one SRL said they would attend mediation if the duty lawyer advised them that it was more appropriate. Perhaps, once involved, SRLs are not be easily diverted from the court system; it is also likely that they do not know that they are required to attend mediation before filing an application.⁵⁷ If the duty lawyer sees them *before* they file an application, SRLs may be more open to this path.

The interpretation by SRLs of 'early intervention' may be narrower than the one used by commentators who see it as a diversion strategy.⁵⁸ The Productivity

⁵³ Chapter IV: Part I: B.I.C: Comments: researcher.

⁵⁴ Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156.

⁵⁵ Chapter IV: Part I: B.I.C: Comments: researcher.

⁵⁶ Since the 2006 Amendments to the FLA, parties are required to attempt mediation prior to filing applications, *Family Law Act 1975* (Cth) s13C.

⁵⁷ *Family Law Act 1975* (Cth) s601. Attending family dispute resolution before applying for Part VII orders.

⁵⁸ Forell and Cain, above n 44; Productivity Commission, above n 23, vol 1, 426.

Commission notes that the 'LANSW (EIU) model makes an important contribution to resolving disputes earlier by filtering clients from advice clinics into mediation and, where appropriate, diverting clients from court'.⁵⁹ EIU duty lawyers said that they considered it an important part of their role to refer SRLs to family relationships centres for alternative dispute resolution or other services such as therapeutic counselling.⁶⁰ This view sees SRLs as consuming more of the court's time and resources than represented litigants, and the duty lawyer as a cost-effective gatekeeper.⁶¹

The researcher and the Launceston duty lawyer considered it an important part of their role to give SRLs legal and non-legal options to resolve their dispute outside the context of court proceedings. While recognising that SRLs may have a complex range of problems, one of which may be a family law dispute, and may attend the court as their first approach, providing legal advice in a family court setting may be counterproductive, discouraging them from considering conciliation/mediation.

The judges had different views from SRLs on the meaning of 'early intervention'. They considered that early intervention services were provided by mediation services⁶² and that the duty lawyer's intervention was 'early' because it was 'on the first return dates'.⁶³ While it was expected that the judges would consider the first time the matter was in court was 'early', this is not the same thing as the duty lawyer providing assistance at the early stages of the *process* before a matter reaches the court. The judges saw the service as worthwhile insofar as it assisted in the efficient administration of the court.⁶⁴ Their views are similar to a finding in the Evaluation of QPILCH: when asked what time they thought most important for SRLs to get assistance, the judges said 'when

⁵⁹ Productivity Commission, above n 23, vol 1 cites LANSW Submission 68.

⁶⁰ Forell and Cain, above n 44, 22.

⁶¹ Ibid 25.

⁶² Chapter IV: Part I: Interviews with Judges 2 and 3.

⁶³ Chapter IV: Part 1: Interview: Judge 1.

⁶⁴ Jeff Giddings et al, 'Evaluation of Queensland Public Interest Law Clearing House Self-Representation Service' (Griffith University 2014), 16.

responding to allegations'.⁶⁵ The clear implication from this comment is that they are focused on court events and court efficiency.

The responses of all other participants were consistent with previous literature and uniform in considering that it was important for the duty lawyer to assist SRLs *before* their matter was in court. The literature identifies early referrals to services designed to support SRLs as very constructive.⁶⁶

The researcher and the Launceston duty lawyer did not consider the provision of advice and assistance on the first day an SRL's matter was in court as early intervention.⁶⁷ They believed in the benefits of a more proactive approach where they saw SRLs other than when their matter was in court or before they filed proceedings. This approach is consistent with the service model used by the EIU, which reports that better outcomes are achieved if duty lawyers see SRLs early.⁶⁸ In the event the matter proceeds through court, duty lawyers can assist in a clinic setting, helping to prepare documents which will comply with the court's rules.⁶⁹

Court staff and family law practitioners were asked at what stage of the process the duty lawyer ought to be involved.⁷⁰ The majority responded 'before the commencement of proceedings', which is consistent with the earlier results and findings of this study. However, some made multiple selections which indicated 'at different stages' (N=17 of 38, 44%) while an equal number thought assistance should be offered only on the day an SRL's matter was in court.⁷¹ As the respondents who selected this last option were family law practitioners, it may be assumed that, as their client was paying for representation, they may have needed to explain to them why an SRL was getting free legal advice. Or

⁶⁵ Ibid 16.

⁶⁶ Ibid 16, 18, 30; Also see Forell and Cain, above n 44.

⁶⁷ Chapter IV: Part I: B.I.C: Interview: LDL.

⁶⁸ Forell and Cain, above n 44. This report found that in 19.7% of matters, the duty lawyers ensured that 'appropriate court documents were filed' and that court staff commented favourably on the difference this assistance made because 'it meant less mistakes as it went through the system. (Registry manager 1)', 25.

⁶⁹ Ibid.

⁷⁰ Chapter IV: Part III: D: Table 23, Question 14 asked stakeholders to nominate at what stage of the process the duty lawyer ought to be involved.

⁷¹ Ibid.

possibly, privately paid lawyers may have a philosophical objection to SRLs receiving advice beyond the day their matter is in court and consider that the Scheme should only offer a once-only service. One family lawyer commented they understood this was 'not a hard-and-fast rule',⁷² suggesting some understanding that SRLs may need more than one level of assistance.

The results indicate that one of the most innovative and important aspects of changes to the Scheme introduced during this study was the triage system. This approach allowed the duty lawyer to screen for and assess an SRL's issue at an early stage and either direct them to other services or progress their matter through the court.

(e) Summary

The results from this study reveal that a duty lawyer first attending to an SRL during busy court lists in the Family Courts does not adequately serve the interests of the SRL or of justice.

The consensus of the participants was that it would be more beneficial for everyone if SRLs received assistance before their matter was in court. On the whole, rather than focusing on what is early intervention, all participants supported the proposition that the duty lawyer provide advice 'at all stages' of litigation. Even if the SRLs who chose all the answer options about the timing of assistance failed to understand that the Scheme does not allow for continuous representation, the other participants were aware of this, and nonetheless were of the view that the Scheme is more likely to provide access to justice for SRLs if it is proactive and flexible.

The development of the policy and practice of the Scheme is sufficiently flexible to provide greater access to justice if the duty lawyer were to provide assistance to SRLs before and beyond their 'imminent court event'. Based on the

⁷² Chapter IV: Part III: D: Table 33, Question 25 asked stakeholders to nominate the advantages, disadvantages and limitations of the duty lawyer service. Also see comments of Stakeholder 25.

successful outcomes noted in the EIU report,⁷³ findings by VicLA⁷⁴ and the literature, this study shows there are significant advantages if the duty lawyer can assist SRLs earlier than the day their matter is in court and that 'early' means as soon as possible.

(f) Awareness of the duty lawyer

Raising awareness of and promoting the service are central to the Scheme being successful as an access to justice measure. This section will discuss the findings about the level of awareness that there is a duty lawyer before exploring an understanding of what the duty lawyer can and cannot do.

Although there is a wealth of information on the internet about the Family Court and how to conduct family law disputes, a number of SRLs commented that they found out about the Scheme by 'word of mouth'. This is an important means of promotion in a small jurisdiction like Tasmania. Good relationships and networks need to be established and maintained between legal and non-legal services to ensure a more 'holistic' approach to the provision of services.⁷⁵

Not one SRL indicated that they accessed information through a website, although one suggested the Scheme be advertised on the Centrelink website. This finding may be peculiar to the SRL demographic in Tasmania, which has high rates of illiteracy and unemployment, and may lack easy access to a computer or be confused by the abundance of information online. They may have difficulty in understanding which forms or documents relate to their dispute. This was identified as a barrier for SRLs in previous studies,⁷⁶ and may be particularly so in Tasmania.⁷⁷

⁷³ Forell and Cain, above n 44.

⁷⁴ Victoria Legal Aid, 'Family Law Legal Aid Services Review', Final Report (2015).

⁷⁵ PwC, Legal Aid Funding, above n 32; Allen Consulting, above n 32.

⁷⁶ Dye, above n 52; Sourdin and Wallace, above n 42.

⁷⁷ See Chapter I: fn 350 detailing the researcher's search through family court websites for forms. In 2011, the courts conducted a Family Law User Satisfaction Survey. The results showed that there was still confusion about the forms and what was to happen in court; < <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2011/family-law-user-satisfaction-survey-results-2011>>; also see Senate Legal and Constitutional Affairs References Committee, *Inquiry into Legal Aid and Access to*

To explore what is available online for SRLs wanting to know about the courts' processes and procedures, the researcher conducted a search using the terms 'representing yourself in the Family Court in Australia'. A number of sites provided advice on 'how to run your family law case',⁷⁸ and the FCA and FCC home pages had 'tips for your court hearing',⁷⁹ but in the main, online information consisted of advice about how to act, what to bring and even what to wear in court. Fact sheets provided by both courts explained which documents a person needs to prepare and gave links to forms and affidavits. The Fact Sheet said that 'although you can prepare your own affidavit, it is often not easy', and suggested the person get legal advice. The online 'tips' are that a person needs to 'be prepared' and 'take paperwork' with them; most either assume that the person has had legal advice and understands the courts' requirements, or that the person has the research capabilities and interest to follow at least a dozen links to find what he or she is looking for. Each website had numerous links to other websites and fact sheets — a maze which needed time and patience to navigate.

This inquiry was time consuming, and revealed that although there is information online which may influence SRLs to think they do not need a lawyer, there is so much of it that SRLs could become more confused. One example stood out, in relation to family court forms: although the FCA and the FCC both use Initiating Applications for interim and final orders,⁸⁰ the FCC requires a supporting affidavit to be filed with an Initiating Application⁸¹ but the FCA does

Justice (Final Report, 2004), Chapter 10: Self-Represented Litigants, [10.70], 198. The report said that court forms and publications need to focus more on the user's than the provider's satisfaction with services; R Hunter and J Giddings, Submission 24, 5 to the Senate Legal and Constitutional Affairs References Committee, *Inquiry into Legal Aid*; Legal Aid Queensland, Submission 73, 45–46; also see Australian Bureau of Statistics–Tasmanian Statistical News, September 2008 and Chapter III: G 2(a) fn 79.

⁷⁸ Victoria Legal Aid 'How to Run your Family Law Case: Representing yourself at a final hearing' Fact Sheet FL01, <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-resource-how-to-run-your-family-law-case.pdf>>.

⁷⁹ Family Court of Australia online services, Fact Sheet 'Going to court—tips for your court hearing', <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/getting-ready-for-court/going-to-court-tips-for-your-court-hearing>>.

⁸⁰ The courts use the same forms for a Response to Initiating Application.

⁸¹ Federal Circuit Court of Australia Rules 2001, Rule 4.05. The FCC also requires the applicant to file a *Notice of Risk* (Federal Circuit Court Rules 2001, Form 1 to Schedule 2) if parenting

not. If filing in the FCA or FCC for interim orders after the case has commenced, the application is called an Application in a Case which also requires an affidavit.⁸² To help users understand which forms to file, they are directed to 'Go to the Protocol for the division of work between the FCA and the FCC'. These distinctions are difficult and possibly meaningless for people who lack legal knowledge. The websites provide very little substantive information or examples of what words to use to write court orders, or what to put into an affidavit that is based on fact, not opinion.

In a Canadian study, SRLs reported their 'frustration in navigating these sometimes complex and dense websites'.⁸³ 'When you read information on the Internet and then it refers you to something else — which refers you to something else — by this time you are overwhelmed. It is endless mayhem'.⁸⁴ While it may appear that the family law justice system is accessible, taking into account that most SRLs in this study said they had problems understanding the system, effective access may mean face-to-face assistance from the duty lawyer.⁸⁵

A key concern in improving access is that SRLs know about the duty lawyer. There was no clear indication in the data from the SRLs in the current study of how many people knew about the Scheme and did not receive help, as opposed to those who simply did not know about the Scheme. The only numbers for this set of participants was that 14 received the assistance of the duty lawyer and 16 did not. What was very clear was that those who did not

orders are being sought and a form pursuant to Rule 13.04A when the parties ask the Court to make a consent order in existing parenting proceedings notifying the court whether or not there have been any allegations of child abuse, neglect, family violence, mental ill health, drug or alcohol abuse, serious parental incapacity or any other allegation involving a risk to a child and, if so, how the consent order attempts to deal with those allegations; <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/forms-and-fees/court-forms/form-topics/family+law/application-parenting>>.

⁸² *Family Law Rules* Rule 5.01.

⁸³ Erin Chesney, Julie Macfarlane and Susan Rice, 'Tracking the Continuing Trends of the Self-Represented Litigant Phenomenon' (Data from the National Self-Represented Litigants Project, 2014–2015) 7.

⁸⁴ Macfarlane, above n 42, 64.

⁸⁵ Also see Bridgette Toy-Cronin, *Keeping up Appearances: Accessing New Zealand's Civil Courts without a Lawyer* (PhD Thesis, University of Otago, Dunedin, 2015), 244. Toy-Cronin makes the observation that in the New Zealand context information technology is no substitute for face-to-face services.

know about the Scheme prior to the survey all said they would have used the duty lawyer had they known about it. This suggests congruence between the expressed belief of SRLs that appearing unrepresented disadvantages them⁸⁶ and that they have a genuine need for assistance to manage their dispute.

The positive response from SRLs, in terms of wanting the service and the high rating given by those who had used it, is strong evidence of a demand for, and perceived value of, duty lawyer services. The range of answer options in some questions may have alerted SRLs to what the duty lawyer could do to help them. The survey did not identify which services the duty lawyer provided, but the range of options presented may have led SRLs to misunderstand the limits of the role.⁸⁷ It may also have created unrealistic expectations, with two SRLs thinking that the duty lawyer would solve all their problems and get them the outcome they wanted.⁸⁸

Only two (N=2 of 16) SRLs said they would not have used the duty lawyer even if they had known about it, with one commenting they wanted to speak to the judge directly. It cannot be known why two would not accept assistance, but may relate to reasons given by SRLs in previous studies: because they knew their own case best, or had had bad experiences with lawyers before or, less charitably, merely wanted to draw proceedings out and make it difficult for the other party who was paying for representation.

The questions put to SRLs on the issue of 'awareness' were designed to identify deficiencies in either the promotion of, or referrals to, the Scheme. Finding that SRLs would have used the Scheme had they known about it was significant. The fact that more participants in the study said they did *not* know about the Scheme would seem to confirm concerns by the researcher that it

⁸⁶ Ibid Table 17, Question 23 asked SRLs whether they considered that representing themselves was a disadvantage where 5 of 16 said they were disadvantaged, 4 of 16 said there was no difference and 7 of 16 did not respond.

⁸⁷ Chapter IV: Part III: D: Table 33, Question 25 sought stakeholders' views on improvements to the Scheme where family law practitioners wanted more information 'about what the duty lawyer can and cannot do' (Stakeholder 5) and 'making practitioners more aware as to the role and service available to SRLs' (Stakeholder 32).

⁸⁸ See Chapter IV: Part I: B.I.A: Table 11, Figure 2 and responses from SRL: 16 and SRL: 18.

was not well advertised,⁸⁹ and the Launceston duty lawyer's comment that not many people seemed to know what the duty lawyer Scheme is or what the duty lawyer does.⁹⁰

Generally, the only criticism from SRLs was that the awareness of services offered by the duty lawyer needed to be increased so that everyone involved knew what the duty lawyer could and could not do and when and where they were available. Some SRLs made suggestions for improving the visibility of the Scheme, and these have been incorporated into the duty lawyers' practice. They include improved signage, a brochure, and an increased profile on the Legal Aid webpage. Nobody said they found out about the Scheme through the internet.⁹¹ All SRLs who commented on what improvements could be made to the Scheme said that there should be more advertising 'to tell people about (the) duty lawyer'.

It was not surprising that the stakeholders showed a higher level of awareness about the Scheme as they are involved with the duty lawyer at a practical level on a regular basis. There were two years between the SRLs' survey and the interviews with the judges, and the survey of court staff and family lawyers.⁹² In that time the researcher made presentations to the profession, designed and distributed a brochure on the Scheme, arranged for signage in the Commonwealth Law Courts in Hobart and Launceston and that an announcement about the duty lawyer prior to the commencement of court be made as well as having input into a revamped LACT website. Despite these initiatives, some stakeholders commented that they were confused about where the duty lawyers were to be found, when they were available, and what they

⁸⁹ The survey of SRLs occurred from 13 May to 28 June 2013. The initiatives which are presented in Chapter IV: Part II: C: as changes made to the Scheme as part of the action research approach which had not yet been implemented.

⁹⁰ Chapter IV: Part I: B.I.C: Interview: LDL.

⁹¹ Also see Australian Bureau of Statistics, Type of Household internet connection by state or territory; the proportion of households in Tasmania with access to a home computer in 2008–09 was 63% (126,000). The proportion improved by 14% with the introduction of broadband internet access in 2010–11, <<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/54661878D9CD5335CA25796600152C0F?opendocument>>.

⁹² See Introduction, Section E: Research Strategy which explains the reasons for the different timeframes for data collection.

could or could not do.⁹³ There is more to be done to increase awareness of the Scheme and clarify duty lawyer services.

There is a difference between knowing about a service and knowing something specific about it. Recommendations are made in Chapter VI which address how information about the Scheme should be provided, advertised and presented.

(g) Exploring an understanding of what the duty lawyer can and cannot do

SRLs were asked what they needed the duty lawyer to help them with.⁹⁴ Not surprisingly, the majority made multiple selections in every question, suggesting they needed help with everything,⁹⁵ or that they did not understand the limitations of the service. More work needs to be done to define and promote duty lawyer services and ensure that there is a clear understanding about the benefits, but also about its limitations.

That a small number of court staff and family law practitioners were confused about the services the duty lawyer provided concerned the researcher.⁹⁶ Nearly one-third of respondents thought there was insufficient information about what services the duty lawyer provides and when and where they are available.⁹⁷ It may have been an incorrect assumption by the researcher that all participants in the study knew of the range of duty lawyer services.

It also presented a significant challenge to the researcher. While it is understandable that SRLs may not know about the service, it was disturbing that there were misconceptions held by stakeholders. This may be because family law practitioners have a traditional view of how the Scheme operates, and expect to see the duty lawyer in court only on a duty list day. They may not be aware that the duty lawyer can perform a range of services at a high level of

⁹³ Chapter IV: Part III: D: Table 26, Question 5 which asked why it may not be clear to people that there is a duty lawyer available. Stakeholder 19 noted insufficient signage and a need for better publication of the duty lawyer's presence and availability; 28% (N=11 of 38) said there was insufficient information about what the lawyer does.

⁹⁴ Chapter IV: Part I: B.I.A: Table 14, Question 10 asked SRLs what the duty lawyer helped them with, listing a range of options.

⁹⁵ Ibid. There were multiple selections made by most respondents and one responded 'all'.

⁹⁶ Chapter IV: Part III: D: Table 33, Question 25.

⁹⁷ Ibid.

competence, save taking a matter to trial.⁹⁸ The judges seemed to have a far more 'aspirational' view of the role, wanting the duty lawyer to appear at all stages of the proceedings, including at trial. As they also had a clear appreciation of the restricted resources of LACT, they also recognised the unlikelihood of funding for broadened duty lawyer responsibilities.

The lack of knowledge of SRLs and the confusion among the professionals indicates that there is more to be done to improve understanding of the Scheme.

(h) Referrals to duty lawyer

The finding that most SRLs were referred to the duty lawyer by court staff⁹⁹ confirmed earlier studies that SRLs mainly receive assistance from court staff.¹⁰⁰ This is a significant finding for this study as it highlights the importance of the court as a major referral source and reinforces the need for the duty lawyer to be based at the court. Despite only one SRL saying they were told by a judge, and another by the other party's lawyer, the results from the stakeholder survey in relation to the number of referrals they made in the period prior to the survey is evidence of how well integrated the Scheme is. The majority of respondents commented positively in responding that a good relationship with the duty lawyer was 'very important' or 'important' to them.¹⁰¹ A

⁹⁸ See *Protocol*, above n 47 [2.3] - the duty lawyer can provide representation for recovery orders and urgent injunctions regarding children. These matters are generally dealt with as an Interim Hearing.

⁹⁹ Chapter IV: Part III: D: Table 29, Question 8 asked stakeholders whether they had ever referred SRLs to the duty lawyer. Most (N=34 of 38, 90%) had referred SRLs to the duty lawyer and Table 30, Question 9 shows that the majority of referrals (N=23 of 38, 68%) came from court staff, with two court staff indicating that they had referred more than 21 SRLs to the duty lawyer in the three months prior to the survey.

¹⁰⁰ Elizabeth Richardson, Tania Sourdin and Nerida Wallace, 'Self-Represented Litigants: Gathering Useful Information' (Final Report, Australian Centre for Justice Innovation, Monash University, 28 June 2012), citing Andrea de Smidt and Kate Dodgson, 'Unbundling our way to outcomes: QPILCH's Self-Representation Service at QCAT, Two Years On' (2012) *Journal of Judicial Administration* 246.

¹⁰¹ Chapter IV: Part III: D: Table 40, Question 24 asked stakeholders to rate the level of importance of their relationship with the duty lawyer. The majority of responses from court staff showed that it was 'very important' that they have a good relationship with the duty lawyer. This finding was supported by the significant number of referrals from court staff to the duty lawyer; also see Part I: B.I.A: Tables 29 and 30. The majority of SRLs said they had found out about the duty lawyer from court staff.

cooperative relationship between court staff, private practitioners and duty lawyers is something which ideally should be common to all jurisdictions where family law practitioners work closely together.

The action research report notes the efforts made by the researcher to build relationships so the court and practitioners can have greater confidence when referring SRLs to the duty lawyer.¹⁰² The high number of referrals from court staff in particular suggests an appreciation of the role by those who deal with SRLs on a regular basis.

(i) Visibility of duty lawyer

All but one stakeholder responded that the duty lawyer would be more visible if located at the court and that it would be helpful if SRLs could be directed to a 'meeting point'.¹⁰³ This suggests the Scheme would work better if there was a single location for the duty lawyer at the court, and clear advertising about where this is and when the duty lawyer is available.

The results from the respondents on the issue of visibility are consistent with those of all the other participants who considered that more people would take up the service if the duty lawyer were located at the court. It is also consistent with the findings in the evaluation of the EIU that duty lawyer services are more easily accessed and delivered if the lawyer is located at the court.¹⁰⁴

(j) What practical difference (whether positive or negative) has the intervention of the duty lawyer made

All participants were asked to consider what advantages or disadvantages they perceived to flow from the Scheme. All agreed or strongly agreed that the duty lawyer's intervention was effective and beneficial for a variety of reasons; there were, however, different opinions on prioritising the benefits the Scheme provided to SRLs and to the court.

¹⁰² Chapter IV: Part II: C: The impact of action research on the study.

¹⁰³ Chapter IV: Part III: D: Table 28. Only Stakeholder 33 said the court and Legal Aid.

¹⁰⁴ Forell and Cain, above n 44.

(a) Better outcomes

The majority of SRLs who had used the service thought their matter proceeded more quickly through the court and had a satisfactory outcome. They said they felt better after speaking to the duty lawyer. This is a positive result as it suggests SRLs gained a better understanding of their rights and were treated fairly.

Judges too said that there were better outcomes when the duty lawyer intervened, in that when the duty lawyer comes back into the room, the matter either progresses more quickly or resolves.¹⁰⁵ Clearly judges are conscious of the need to avoid delays that have an impact on both the efficiency of the court and the other party. While the judges focused on the benefits for the court as the primary purpose of the Scheme, they recognised that SRLs clearly benefited from having experienced duty lawyers performing at a high level.

Respondents were also positive about the improved outcomes as a result of the duty lawyer's intervention. Respondents were concerned about the delays and frustrations caused by SRLs. They acknowledged the benefits of early assistance leading to faster processes and better opportunities for settlement.

All SRLs, with one exception,¹⁰⁶ said they considered self-representation disadvantaged them and that they felt better about the family court system after having received help from the duty lawyer. The one SRL who said they felt 'worse' after receiving help from the duty lawyer did not explain why. However, that particular SRL had multiple negative answers ranging from the above comment rating the help offered as 'adequate' (whereas the majority said 'very good' and 'good') to saying they felt rushed or pushed by the judge and the Registrar (but not the duty lawyer).¹⁰⁷

¹⁰⁵ Chapter IV: Part I: B.I.B: Interview: Judge 3.

¹⁰⁶ Chapter IV: Part I: B.I.A: Table 17 and Question 23, 5 of 16 SRLs responded that they thought representing themselves disadvantaged them; 4 of 16 said it made no difference; 7 of 16 did not respond.

¹⁰⁷ Ibid Table 19, Question 14 in which SRL 17 selected that they felt rushed or pushed towards settlement by almost all categories except for Judge of the Family Court, Family Consultant and duty lawyer.

(b) Participating in negotiations

When identifying what practical difference the intervention of the duty lawyer made, there were differences of opinion as to how useful the duty lawyer could be in negotiations with the other party's lawyer. Only two SRLs (N=2 of 14) said the duty lawyer had been involved in their negotiations¹⁰⁸ and only two who had not seen the duty lawyer said they wanted help with negotiations. All the other participants in this study rated the duty lawyer's involvement in negotiations very highly and considered it improved outcomes for SRLs and everyone else involved in the family law system.¹⁰⁹

Judges also felt that the service ensures that vulnerable SRLs cannot be taken advantage of by the other party's lawyer;¹¹⁰ that the SRL's position is put by a competent neutral professional and the duty lawyer provides the SRL with rational and reasonable advice on settlement options they may not have understood were possible.¹¹¹

It was interesting to note that private practitioners in the stakeholder survey rated negotiations with the other party's lawyer resulting in a settlement as the primary difference made by the duty lawyer.¹¹² This suggests that they recognised the lack of legal representation for SRLs made it much more difficult for them to reach a negotiated settlement. A preference for dealing with another legal professional as opposed to an SRL may also indicate an appreciation that it would lessen the impact on the other party, saving them time and money. The result is not surprising, as previous surveys of family law professionals reveal

¹⁰⁸ Ibid Table 15, Question 21 asked SRLs to nominate what they would have liked the duty lawyer to help them with.

¹⁰⁹ Chapter IV: Part III: D: Table 36 for stakeholders' views.

¹¹⁰ Duncan Webb, 'The Right Not to Have a Lawyer' (2007) 16 *Journal of Judicial Administration* 165.

¹¹¹ Productivity Commission, above n 23, vol 1, 502. The report comments that there are problems when lawyers 'deal directly with SRLs in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions'.

¹¹² Chapter IV: Part III: D: Table 36 where 36 of 38 stakeholders said that the duty lawyer's involvement in negotiations was of the most benefit to SRLs; and Table 38 where 33 of 38 stakeholders said the duty lawyer's involvement in negotiations progressed the matter to settlement more quickly.

that they recognised that SRLs in the family courts seemed to have difficulty in negotiating a settlement once proceedings had commenced.¹¹³

ICLs who came into contact with SRLs said they were cautious about dealing with SRLs directly and were concerned about allegations of bullying or bias, or a perception from the other party that they were helping the other party when it was not their job.

The inclusion of the duty lawyer in negotiations would appear to benefit everyone involved in a family law dispute. A possible explanation for the differences of opinion as to the value of the duty lawyer's assistance may be that SRLs have different priorities. This may be an underestimation of the difficulties most SRLs have in dealing with lawyers.¹¹⁴ SRLs may not appreciate that their level of involvement brings an emotional stake to the process which is likely to have an adverse impact. Alternatively, this set of SRLs might not yet have been at the stage where this was of any importance.

The responses from the legal professionals may seem self-serving, as clearly their job was made easier if they could deal with a legal professional rather than an SRL. On the other hand, it could be a genuine concern that SRLs are disadvantaged when dealing with a lawyer; the duty lawyer's assistance reduces this imbalance. This latter view may be more representative of how the legal professionals viewed their interaction with SRLs, in that responses to questions about what represents access to justice for SRLs drew comments which focused on issues of their receiving equal justice or fairness in the court system. The family lawyers' views may genuinely reflect a concern that it is important for disadvantaged people to have equal access to legal services¹¹⁵

¹¹³ Coumarelos et al 2012, above n 42.

¹¹⁴ Hunter et al, above n 45, cited in Richardson, Sourdin and Wallace, above n 100, 17.

¹¹⁵ Productivity Commission, above n 23, vol 2, 757, citing Australian Lawyers Alliance, Submission 107, Law Council of Australia, Submission 96, Slater and Gordon Lawyers, Submission 56, and National Legal Aid, Submission 123, 'but for the presence of legal assistance service providers, the capacity of society to provide access to justice—itself an essential feature of the rule of law and civil society—will be diminished'.

and that, in family law disputes, less adversarial practices at all stages are worthwhile.¹¹⁶

The literature indicates that matters are more likely to settle when both parties are represented in negotiations.¹¹⁷ Research on the outcomes achieved by SRLs in negotiations reveals that they 'either withdraw from their case [or] capitulate to the other party's demands'.¹¹⁸ Moreover, in other studies SRLs have indicated they need advice on 'negotiation or a strategy for talking to the other side',¹¹⁹ given that they lack the training to be on a level with an experienced lawyer.

As some SRLs may not appreciate the difficulties they face in negotiating with lawyers, the duty lawyer's assistance makes a significant difference to the outcome of a case and brings a level of equality to the matter. Intervention in negotiations can prevent a matter escalating and, in many cases, contribute to early settlement. The duty lawyers noted that SRLs tend to have difficulties in communicating what they want. They are often unprepared, and do not know how to define the relevant issues. This disadvantages them in negotiations. The duty lawyers noted that when they represent SRLs in negotiations, court staff and/or the other party's lawyer provide them with documents and background. This is a testament to the cooperative working practices represented by the less adversarial approach which may lead to a matter resolving more quickly.¹²⁰

All the legal professionals saw the benefit of the duty lawyer's involvement in negotiations as an efficient way of resolving the dispute or, at least, delimiting the issues. The increasing emphasis on negotiation is consistent with literature which supports a less adversarial role of lawyers and reveals that over 95 per

¹¹⁶ Hunter et al, above n 45, 156.

¹¹⁷ Justice Research Centre, 'Empirical information about the Family Court of Australia: Part One', (Family Court Research Conducted for the Australian Law Reform Commission, June 1999), cited in Richardson, Sourdin and Wallace, above n 101, 115.

¹¹⁸ Hunter et al, above n 45

¹¹⁹ Macfarlane, above n 42.

¹²⁰ Forell and Cain, above n 44, 25.

cent of disputes end in a negotiated outcome.¹²¹ It would be sensible, therefore, for SRLs to use the duty lawyer to resolve their disputes. It may be that more needs to be done to advise SRLs of the role the duty lawyer can play in negotiations.

5.2 RQ2: What is the purpose and the nature of the Scheme from the perspective of the key participants in the family law system?

Each category of participant in the study was asked to describe what, in their opinion, was the purpose and nature of the Scheme and the role of the duty lawyer. The questions put to SRLs in relation to the purpose of the Scheme were in the context of identifying what services they needed from the duty lawyer. The majority said they would have liked help understanding court processes and procedures. This result is in line with research which has found that more people needed assistance with procedural issues than with legal knowledge.¹²²

One judge commented that the primary purpose of the Scheme was to help SRLs who are not eligible for legal aid but cannot afford to pay the costs of a private lawyer. That view was shared by most participants in the study.

(a) Assisting SRLs with the preparation of documents

The literature has identified that poorly drafted applications which contain irrelevant and inappropriate information cause problems for and affect the

¹²¹ Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008); also see Julie Macfarlane, 'The New Lawyer: Moving from Warrior to Conflict Resolver' (2009) 10 (8) *ADR Bulletin*, Article 5, <<http://epublications.bond.edu.au/adr/vol10/iss8/5>>.

¹²² Louis Schetzer, Joanna Mullins and Roberto Buonamano, 'Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW' (Background Paper, 2002, Law and Justice Foundation of New South Wales), 65; Productivity Commission, above n 23, vol 1, 370 citing Springvale Monash Legal Service, Submission 84, 9 quoting The United Kingdom Judicial Working Group on Litigants in Person (Judiciary of England and Wales 2013 report 494; citing QPILCH Submission 58, quoting The American Bar Association, 510; Forell and Cain, above n 44. The EIU duty service recorded that in three quarters of all matters, SRLs were provided with procedural advice, 14.

efficient running of the court.¹²³ Poorly drafted documents create delays in the court, with matters needing to be adjourned to allow SRLs to amend and refile.¹²⁴ The wealth of information on internet sites may make SRLs think it will be easy for them to prepare documents.

In 2000, in a project undertaken by the FCA, service providers reported that the first presentation for SRLs at the court was 'terrifying'. The report cited comments from Community Legal Services which assisted SRLs with documents that they were often presented 'with a stack of forms, often the wrong ones or wrongly completed' and that SRLs 'are overwhelmed and confused by bureaucracy ...The complexity means it is difficult to know where to start'.¹²⁵ Service providers said that there were 'too many forms'.¹²⁶

The concern that SRLs have problems with court forms and affidavits was shared by the duty lawyers and stakeholders, who thought that it would benefit SRLs if the duty lawyer could assist with the preparation of documents before proceedings commenced.¹²⁷ Results from the duty lawyers' data indicate that SRLs do not know what to put in their applications or affidavits. Duty lawyers gave examples of SRLs seeking orders which the court could not make on documents that were incorrectly drawn and contained irrelevant, and sometimes inappropriate, material.¹²⁸ The judges described delays caused by SRLs filing incorrect or inadequate material. The matter either had to be stood down or adjourned to the next duty list. In Tasmania, where duty lists are usually held on the first Monday and Tuesday of each month, this delay could cause prejudice and stress to an SRL, whether an applicant or respondent, trying to get some time with their children. Delays were also inefficient for the court and frustrated the lawyer for the other party.

¹²³ Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Department of Constitutional Affairs Research Series 2/05 (United Kingdom, 2005), 82.

¹²⁴ Ibid.

¹²⁵ Family Court of Australia, *Self-Represented Litigants—A Challenge*, Project Report December 2000–December 2002 (Family Court of Australia, 2003), 38.

¹²⁶ Ibid 35.

¹²⁷ Chapter IV: D: Part III: Table 37 Question 13 where almost all stakeholders (N=37 of 38) thought that the duty lawyer helping SRLs with their documents was either 'very important' or 'important'.

¹²⁸ Chapter IV: B: Part I: B.I.C: Comments: researcher.

In general, the judges supported the idea that the duty lawyer assist an SRL with documents. Not all the judges had the same view. Two judges endorsed the desirability of advice and representation when an SRL's matter was in court. One judge said they thought that by the time SRLs were in court, they should know what each party wants: 'I'd rather see the resources spent in the court at that stage'.¹²⁹ Two judges acknowledged that 'most people struggle' and 'don't understand'¹³⁰ how to draft orders or what to put in an affidavit.¹³¹ One judge suggested that it would be helpful to the court for SRLs to see the duty lawyer before they filed their documents and then 'the documents would make sense'.¹³² The judge thought it might be a service Legal Aid or a Community Legal Service could do¹³³ and that it 'would certainly help in terms of the efficiency of the way things go through the court'.¹³⁴ This comment can be interpreted as an appreciation that the system is complex and the court's requirements in relation to documentation are beyond 'most people', and confirms previous findings that the problem SRLs have is with the system, and it is the system which should change.¹³⁵ It lacks, however, some understanding of the realities of legal services available for SRLs.

The PwC report on National Legal Aid services identified the information and education services provided by LACs and Community Legal Centres to the community as early intervention measures.¹³⁶ The range of services 'focus on preventative justice measures ... to take the most appropriate path through, or away from the justice system to resolve their issues'.¹³⁷ The reports noted that

¹²⁹ Ibid.

¹³⁰ Chapter IV: Part I: B.I.B: Interview: Judge 2.

¹³¹ Chapter IV: Part I: B.I.B: Interview: Judge 1.

¹³² Chapter IV: Part I: B.I.B: Interview: Judge 1.

¹³³ Giddings et al, above n 64, 16. The Self-Represented Service has volunteer solicitors who provide pro bono assistance to help SRLs prepare documents. QPILCH's volunteer solicitors do not represent clients in court. Overseas models include Toronto, Canada's First Stop Legal Centre, a full service paralegal firm which assists SRLs with drafting legal documents on 'easy payment arrangements'. <<http://toronto.craigslist.ca/tor/lgs/5312390724.html>>

¹³⁴ Chapter IV: Part I: B.I.B: Interview: Judge 1.

¹³⁵ Faulks, above n 19.

¹³⁶ PwC, Legal Aid Funding, above n 32. There is no specific reference in the PwC report to legal services for women. In Tasmania, the Women's Legal Service is funded to provide free legal advice or referrals by telephone and limited face-to-face appointments, but not to provide assistance with drafting documents. See Women's Legal Service Tasmania, <<http://www.womenslegaltas.org.au/legal-services/legal-advice>>.

¹³⁷ PwC, Legal Aid Funding, above n 32, 21.

one of the most important services these centres provide is to assist SRLs with their paperwork. However, there is no mention in the PwC report of any funding or capacity for agencies providing these services to assist SRLs in drafting documents. In fact, the PwC report specifically refers to duty lawyer services as providing this assistance.¹³⁸ The Productivity Commission report cites the submission from QPILCH which confirms that people who attend their Self-Representation Service:

[s]truggle with court forms and timelines ... court forms are often not simple or useable. ... The use of legal terminology can confuse, especially those from non-English speaking backgrounds. While these forms do contain guidance notes, a person would have to be legally trained to source and interpret the rules to which they refer.¹³⁹

The judge who did not consider it the most important use of the duty lawyer's time to assist SRLs with documents may have had the QPILCH SRS model in mind.¹⁴⁰ This is not a model available in Tasmania, where face-to-face legal assistance services are provided by LACT in Hobart and its offices in the north of the state, the Women's Legal Service in Hobart, the Hobart Community Legal Service and its equivalent service in Launceston, and the North and North West Community Legal Service in Devonport.¹⁴¹ These agencies are funded under the National Partnership Agreement to provide legal information and education; they lack the resources to meet the needs of SRLs to help them draft documents.¹⁴² Therefore, while there may be some compassion and insight shown by the judges as to the difficulties SRLs confront, there may be some overestimation of the capacity of the services available to assist them.

¹³⁸ Ibid 30.

¹³⁹ Productivity Commission, above n 23, vol 1 citing QPILCH, Submission 58, 3, 12.

¹⁴⁰ Cate Banks, 'Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane' (Cate Banks Consulting, June 2013; Giddings et al, above n 64).

¹⁴¹ The Launceston Community Legal Centre is a government funded organisation offering free legal advice on general law, welfare rights, disability discrimination, employment law and family law. The North and North West Community Legal Service offers legal advice on family law (excluding property matters), criminal matters, consumer law, discrimination, employment law, youth issues, wills, Power of Attorney and Enduring Guardianships, neighbourhood disputes, family violence and care and protection matters.

¹⁴² It needs to be made clear that in relation to LACT, these services are available to people who are *not* eligible for legal aid.

The claim that each party would know what the other is seeking by the time the matter is in court is also debatable. It does not accord with the judges' acknowledgement that people representing themselves generally do not know what they are talking about, often fill out the wrong forms and do not correctly draft orders. The duty lawyers provide a different perspective, noting that most people come to see them either with no documents at all or with a shopping bag full of documents in no particular order.¹⁴³ The SRLs often cannot articulate what they want in terms of an order the court can make. Moreover, many SRLs, either as applicants or respondents, may have not communicated with the other party (or their lawyer) prior to filing their documentation and do not know what the other party's response to their proposal is, or even what they are seeking. More often than not, each party hears what the other is seeking on the first return date.

The researcher considered and the Launceston duty lawyer commented that, in their view, SRLs were confused about which form to fill out for which court and the correct words for orders.¹⁴⁴ They assisted SRLs to draft orders in applications, responses and Consent Orders in a way that allow the matter to proceed through the court without delay, but felt it would benefit SRLs and the court system if they had extended time and better resources.¹⁴⁵ Court staff added that their job too was made easier if they were presented with forms which were correctly filled out.¹⁴⁶

One of the important findings from the duty lawyers was that they wanted additional time outside the day an SRL's matter is in court and beyond the Monday clinic at the court to help SRLs with their documents. The current practice does not meet the needs of SRLs who want assistance with drafting documents as well as legal advice and assistance. The duty lawyers suggested

¹⁴³ Chapter IV: Part I: B.I.C: Comments: researcher.

¹⁴⁴ Chapter IV: Part I: B.I.C: Comments: researcher. When a judge asks an SRL in a children's matter what orders they want the court to make, they frequently say, 'I just want to see my kids'.

¹⁴⁵ The duty lawyers in Hobart and Launceston take handwritten notes and handwrite any draft orders. This is time consuming and inefficient. The Director, LACT, approved the Hobart duty lawyer's request that both duty lawyer offices be equipped with a telephone, computer with internet access to LACT's website and pretexts, a copier and a printer.

¹⁴⁶ Chapter IV: Part III: D: Comments: Stakeholder 25.

that their practice be extended in time and scope to assist with and review documentation.

Respondents considered it important that SRLs see the duty lawyer before commencing proceedings. Court staff said they referred SRLs to the duty lawyer when they found that an SRL had incorrectly completed documentation, and that saved a great deal of anxiety and time. A family lawyer thought that the duty lawyer's involvement might result in SRLs seeking 'sensible orders' but, more importantly, would 'ensure that family violence or risk of child abuse is detected and flagged, that proper referrals are made and that there is the necessary evidence to support the Orders'.¹⁴⁷ While this general recognition of the benefits which the duty lawyer's assistance with documents provided a valuable indicator of participants' views, respondents were aware that these services cannot be provided within the constraints imposed under the current arrangements. The family lawyer who made the comment above added that they thought the service for duty lawyers to assist with documents was available to some degree through the Monday clinic, but understood that the 'capacity is currently limited'.¹⁴⁸

It was therefore interesting to note that SRLs who had seen the duty lawyer said they benefited most by being told how to fill out documents correctly and frame orders which are enforceable by the court. It may be that their involvement in the court system had already demonstrated to them that the information provided in their documents would be used to make decisions about their matter and failure to complete the documents properly would result in delays. When a matter concerned a dispute about spending time with a child whom a parent has not seen for months, adjourning the matter to the next month's duty list had a significant impact on both parties. The issue for SRLs seemed to be their recognition that they were not on an equal footing, in particular if they commenced proceedings with flawed documentation. The introduction of the triage system where the duty lawyer assists SRLs with court applications may be seen as one of the most innovative aspects of the Tasmanian Duty Lawyer

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

Scheme. The results show that this assistance helps judges, and the lawyer for the other party, understand what orders the SRL is seeking and allows for either meaningful negotiation to occur or the matter to progress more quickly through the court.

The theme emerging from the participants in relation to assistance with documents was that the duty lawyer played a key role in helping the court system run more efficiently if they assisted SRLs with the preparation of documents prior to proceedings being filed in the court. The duty lawyers considered that this service could be better provided if they had additional time with SRLs outside the emotionally charged environment of the court. Given that no other services in the state offer this type of assistance, and the view that there is an economic value to providing a service at an early stage to derive cost benefits later, it is reasonable to assume that if the duty lawyer service was extended and enhanced and provided with appropriate resources, there would be advantages to the entire family law system.

Recommendations are made in the next chapter which encompass systems to allow duty lawyers to assist SRLs complete forms and documents prior to filing in the court, on the basis that this measure would give direction, clarity and substance to an SRL's application and represent a significant efficiency benefit to the court system.

(b) Providing procedural advice

A significant number of SRLs (N=7 of 16) said they wanted an understanding of court practices and procedures. This result is consistent with research which shows that regardless of simplified forms and improved court practices, SRLs still struggle with understanding the court process.¹⁴⁹ SRLs who had not seen the duty lawyer were asked what they would have liked the duty lawyer to help

¹⁴⁹ Dewar, Smith and Banks, above n 45; Productivity Commission, above n 23, vol 1; Don Clairmont and Ian Joyce, *The Summary Advice Counsel Initiative Assessing its Implementation Impact and Future Directions in Two Nova Scotia Urban Areas*, (Dalhousie University, July 17, 2006). 'Summary Advice Counsel' is the term used for duty lawyers in the civil (family law) jurisdiction.

them with.¹⁵⁰ For those who responded ‘getting an understanding of the system’ as their primary need (N=7 of 16), an explanation may be that these SRLs had not as yet had matters in the court, and sought information about what they had to do and might expect at that stage; or as previously mentioned, SRLs might have accessed confusing online information about the court’s processes and procedures. However, if this group had not yet filed or responded to an application, they would be unlikely to appreciate the requirements for filling in forms and having correct documents.

Two-thirds of the stakeholder respondents (N=26 of 38, 68%) said that one of the most important services the duty lawyer could provide to SRLs is to explain ‘court processes and procedures’.¹⁵¹ Family law practitioners seemed to have a good understanding of the practical difficulties confronting SRLs. One thought SRLs obtained their information on ‘how things work at court’ from American television, and commented that ‘there is only so much the opposing lawyer or the judicial officer can do to explain without running into ethical issues or issues of bias’.¹⁵² This can be interpreted as an appreciation that if the duty lawyer were to provide procedural advice, it would be of benefit to all those involved in the court system. The researcher noted that SRLs struggled to understand something as simple to a lawyer as ‘make file and serve’ when a judge makes an order for them to ‘do something’.¹⁵³

These results are, then, not surprising. Beyond the findings in previous research, this study shows that SRLs need help navigating an unfamiliar, procedurally complex system with its arcane language and strict rules. It is not within the scope of this study to suggest changes to the court system; however, the results suggest that SRLs will benefit from receiving face-to-face advice that does not assume an understanding of the information and fact sheets available, online, even if they accessed this.

¹⁵⁰ Chapter IV: Part I: B.I.A: Table 15, Question 21 asked SRLs who had not received duty lawyer assistance to nominate which services would they have liked to have received.

¹⁵¹ Chapter IV: Part III: D: Table 36, Question 12: Stakeholders rated a range of interventions which would be most beneficial to SRLs.

¹⁵² Chapter IV: Part III: D: Comments: Stakeholder 25.

¹⁵³ Chapter IV: Part I: B.I.C: Comments: researcher.

(c) Providing SRLs with advice on the merits of their matter

SRLs who had been assisted by the duty lawyer did not respond predictably when indicating what they would do if the duty lawyer told them their matter lacked merit.¹⁵⁴ Almost all said they would seek another opinion; they were not at ease with advice that did not fit their belief that their case had merit.

The literature on the impact of self-representation reveals that some people may not be able to assess the merits of their case accurately because they have a belief that they are the only person who knows their case fully.¹⁵⁵ Sourdin and Wallace completed a study on difficult and/or obsessive litigants and noted that there were some 'that [distort] the system to the detriment of those whom they oppose in court actions and [consume] more time and more resources'.¹⁵⁶

Given the SRLs' responses, it may be that they belonged to the behavioural group that were determined to take their case all the way. This was not encouraging. Perhaps the question could have been better phrased: a different result might have been achieved if there had been more options instead of a focus on the merits and only offering discontinuing proceedings.

Regardless, the fact that the majority of SRLs said they would seek another opinion does not advance our understanding of what SRLs thought, as there is no explanation as to whether they would seek a second opinion from a privately paid lawyer or attend another free legal service. It may be that whatever options SRLs were presented with, they would still have unreasonable expectations and proceed with an unmeritorious matter. On the other hand, their responses may have simply depended on at what stage of their proceedings they were at the time of the survey. If they were at a very early stage, it is understandable that they believed they knew their case better than the duty lawyer and were justified in ignoring the advice. They might not, as yet, have experienced the stress of

¹⁵⁴ Chapter IV: Part III: D: Table 31, Question 15 asked stakeholders to nominate the number of referrals of SRLs to the duty lawyer.

¹⁵⁵ Sourdin and Wallace, above n 42 citing Family Law Council, above n 45.

¹⁵⁶ Ibid 10.

self-representation and undergone the significant emotional burden of running their own case. Those who had been in the court system for some time might have been more receptive to the duty lawyer's advice, having observed how matters similar to their own were dealt with by the court. Or it may be that the SRLs who participated in the survey were among the 'small number of SRLs ... categorised as "difficult", "obsessive"'¹⁵⁷ who would not have accepted any lawyer's advice. Regardless of whether the SRLs who completed the survey wanted to accept the advice, the majority of the other participants considered advice about the merits of their case one of the key purposes of the service that the duty lawyer provided.

All other participants in the study stressed the importance of providing SRLs with advice about the merits of their matter, no doubt in the hope that this might better guide and prepare SRLs, or divert matters from the court to be resolved elsewhere. One stakeholder expressed an opinion which may reflect the thoughts of others: 'Often SRLs do not want to listen to advice other than what they want to hear'.¹⁵⁸ This comment may also express a level of frustration on the part of the family lawyer in dealing with SRLs.

The judges considered one purpose of the Scheme 'extraordinarily valuable',¹⁵⁹ while respondents said it was 'very important': that the duty lawyer provides SRLs with a 'reality check' which 'can either resolve or progress (the matter) to the next stage'.¹⁶⁰ The duty lawyers commented that they do give realistic and sometimes blunt advice and warn of the consequences, both emotional and financial, of an SRL proceeding to trial when their matter lacks merit. The Evaluation of the EIU stressed the importance of the Unit acting as a referral service as well as providing assistance in a legal dispute.¹⁶¹ These purposes

¹⁵⁷ Ibid 54.

¹⁵⁸ Chapter IV: Part III: D: Table 32, Question 16, where stakeholders were requested to explain why they 'rarely' or 'never' referred SRLs to the duty lawyer.

¹⁵⁹ Chapter IV: B.I.2 Part I: Interview: Judge 2.

¹⁶⁰ Ibid Interview: Judge 3.

¹⁶¹ Forell and Cain, above n 44. The EIU report says the purpose of the duty lawyer service is to direct the self-represented party away from irrelevant issues, explaining why; assist the self-represented party to present their evidence and test the evidence of the other party; and assist the self-represented party to present their submissions by directing their attention to the relevant issues and asking for their response.

are complementary and not exclusive; it *is* possible for the duty lawyer to assist SRLs and improve the performance of the family law system. The Scheme then works as an asset providing a range of services designed to promote access to justice and the effectiveness of the court.

All the legal professionals thought that one of the most important aspects of the advice the duty lawyer can provide SRLs is a reality check at an early stage. It may be assumed that legal professionals look to the duty lawyer to divert unmeritorious matters from the court, refer people to mediation or, if the matter is in the court, at least confine the issues in the documents to those relevant to the proceedings. The legal professionals acknowledge that this would benefit SRLs, but more importantly, it would improve the progress of SRLs' matters through the court proceedings. Both of these are positive outcomes for SRLs and clearly assist in the efficient running of the court and reduce the impact of self-representation on everyone involved in the family law system.¹⁶²

(d) Managing competing priorities in service delivery

One of the aspects of the question relating to the purpose and nature of the duty lawyer's role involved asking duty lawyers how they do their job and whether they think what they do makes a difference to outcomes for SRLs. The Launceston duty lawyer said one of the best things about being a duty lawyer was that 'we make a difference' by helping people.¹⁶³ However, it was apparent that she had difficulties in managing her in-house client workload with her duty lawyer obligations. She said she felt 'guilty' that she only devoted 10 per cent of her time to duty lawyer services.¹⁶⁴ By contrast, the researcher found that being a dedicated duty lawyer without responsibilities for in-house clients was 'liberating'.

This is an important issue in the context of the difference in the delivery of the duty lawyer service from a perspective wider than the Tasmanian jurisdiction.

¹⁶² Chapter IV: Part III: D: Tables 38 and 41. It was generally agreed that SRLs place stress on judges, court staff, lawyers on the other side of the matter, and SRLs themselves.

¹⁶³ Chapter IV: Part I: B.I.C Interview: LDL.

¹⁶⁴ *Ibid.*

The fact that the researcher could make changes to the Hobart practice was the result of a personal decision to reduce her hours and concentrate on her duty lawyer role. As she had no client responsibilities, she could provide duty lawyer services without concern that it would affect any other aspect of the family law practice. Indeed, the arrangement gave her flexibility to schedule appointments for SRLs at the Monday clinic session and respond to referrals from Legal Aid or private practitioners who had an SRL on the other side of their matter by telephone or email as required. She was able to assist people who had been referred by the telephone advice line, attended Legal Aid clinics or were previously in receipt of legal aid whose grant had since ceased. She was therefore able to respond to requests on an ad hoc basis outside the duty list and assist a larger number of SRLs.¹⁶⁵

The comments from the Launceston duty lawyer demonstrate the difficulties the traditional Scheme presents. The Launceston duty lawyer candidly said she could be spending more time doing duty lawyer work if not for the pressure of having in-house clients whom she prioritised over SRLs. She explained that the demands on her time were not consistent; however, she responded to requests from the court when required and spent as much time as the matter deserved.

This conflict in working arrangements can be managed to deliver the duty lawyer service better. Recommendations are made in Chapter VI designed to extend the hours of the duty lawyer service in Tasmania and ensure it is better resourced.

(e) To which proceedings should the duty lawyer give priority?

The question of what type of matter a duty lawyer should prioritise was put to judges, the Launceston duty lawyer and survey respondents.¹⁶⁶ In general, there was agreement that the duty lawyer should assist 'vulnerable people'.

¹⁶⁵ See Chapter IV: Part II: C: Impact of action research on the study.

¹⁶⁶ Chapter IV: B.I.B Part I: Question to judges: In which proceedings should the duty lawyer give priority? Also see Part III: D: Table 39, Question 21 which put the same question to stakeholders and Table 34, Question 10 asking stakeholders to rank the services the duty lawyer should give priority to as part of the duty lawyer's main purpose. Most respondents indicated assistance should be on a 'first come, first served' basis.

This is in line with the principles expressed in the Protocol.¹⁶⁷ To whom the duty lawyer should give priority when there are allegations of family violence is particularly important, given the high levels of family violence generally and its impact on the court.¹⁶⁸ The issue is complicated by the fact that often both the alleged victim and the alleged perpetrator are self-represented.

Specific reference to violence has gradually increased since the reforms to the *Family Law Act 1975* in 2006. The 2006 reforms made it clear that family violence is a significant factor for the court's consideration when determining children's matters.¹⁶⁹ Following a number of studies and reviews about family violence,¹⁷⁰ further reforms were introduced to improve the legal framework and the situation for victims of family violence.¹⁷¹

When allegations of family violence or child abuse have been made, the legislation provides exemptions from the requirement to undertake family dispute resolution prior to filing an application in the courts.¹⁷² However, problems can arise as a result of complex funding arrangements whereby victims of family violence may receive legal aid and assistance in the

¹⁶⁷ *Protocol*, above n 47 [3.1] refers to family violence considerations under *T & S* [2001] FLC 93-086.

¹⁶⁸ Tasmania's 'Safe Homes, Safe Families' Family Violence Action Plan 2015–2020 is the Tasmanian Government's coordinated whole-of-government action plan to respond to family violence; <<http://www.dpac.tas.gov.au/safehomessafefamilies>>

¹⁶⁹ See Chapter I: E (v) Family Law Reforms; also see Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (2009) Melbourne: Australian Institute of Family Studies, ('Kaspiew et al 2009').

¹⁷⁰ Richard Colin Chisholm, *Family Courts Violence Review*, (2010), Attorney-General's Department, (Australia), <<http://apo.org.au/node/201315>>; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law issues*, December 2009, <www.ag.gov.au/www.agd/agd.nsf/Page/Families-FamilyCourtsViolenceReview>; ALRC, *Family Violence: Improving Legal Frameworks* (Consultation Paper, April 2010) <www.ag.gov.au/publications/familyviolence-%E2%80%94improving-legal-frameworks-alrc-cps-1>; ALRC/NSWLRC, *Family Violence—A National Legal Response: Summary Report* (ALRC 114/2010 NSWLRC 128/2010).

¹⁷¹ *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth); also see Chapter I, E (v) Family Law Reforms; Kaspiew et al, above n 169.

¹⁷² *Family Law Act 1975* (Cth) Section 60I (9) lists the exceptions to the requirement to attend family dispute resolution before making an application for a parenting order under Part VII.

Magistrates Court but not be granted legal aid for family law matters.¹⁷³ Vulnerable people may be self-represented in family law disputes and, rather than the court being the last resort, it is the first and only resort for people to seek resolution. In the context of this study, it was important for the researcher to hear from legal professionals who had been involved in proceedings where there were allegations of family violence, to understand what service was expected from the duty lawyer.

Although the question was not put directly to judges, the issue was raised in conversation when discussing vulnerable people. The common view was that the duty lawyer should assist the alleged victim, although there was also an acknowledgement that the alleged victim was often in receipt of legal aid. Judges have the power to dismiss proceedings and make a costs order if they are satisfied that proceedings are frivolous or vexatious.¹⁷⁴ They also have the authority to control proceedings where SRLs use cross-examination of their former spouse as an opportunity for harassment and abuse.¹⁷⁵ It is understandable, therefore, that judges suggest that the duty lawyer assist the alleged victim.

Other respondents to the stakeholder survey also shared the view that a main purpose of the duty lawyer was to become involved in urgent interim hearings, particularly in children's matters and where there was family violence.¹⁷⁶ The National Protocol allows the duty lawyer to appear for Recovery Orders and other urgent injunctions regarding children,¹⁷⁷ but will not provide 'representation for Interim Hearings, Contravention Applications and Final hearings'.¹⁷⁸ Judges were concerned about the difficulties confronting alleged

¹⁷³ Funding for family violence matters is primarily by state governments. These matters are dealt with in the Magistrate's Court whereas family law matters receive Commonwealth funding.

¹⁷⁴ *Family Law Act 1975* (Cth) s118. The court may, at any stage of proceedings under this Act, if a court is satisfied that the proceedings are frivolous or vexatious: (a) dismiss the proceedings; and (b) make such order as to costs as the court considers just.

¹⁷⁵ *Family Law Act 1975* (Cth) s69ZX.

¹⁷⁶ Chapter IV: Part III: D: Table 39, Question 21 asked stakeholders to comment on which matters the duty lawyer should prioritise.

¹⁷⁷ *Protocol*, above n 47 [2.3].

¹⁷⁸ *Ibid* [2.4].

victims of family violence, and considered the duty lawyer could play a pivotal role in supporting these victims.

These observations are consistent with the purpose of the Scheme, as the duty lawyer does not apply a means or merit test to an SRL needing assistance. Although the duty lawyer seems to be prevented from appearing at interim hearings, the Protocol offers an exclusion in relation to family violence and allows the duty lawyer to assist a vulnerable person where 'there are specific issues ... which have an impact upon the unrepresented party's capacity to appear on their own behalf'.¹⁷⁹

The researcher said as the alleged victim is more often than not represented, she assists the alleged perpetrator. She considered this a valuable intervention in that aggression by the alleged perpetrator may be defused when they have to deal with a legal professional rather than their alleged victim. The Scheme is sufficiently elastic to allow duty lawyers to appear at Interim Hearings where a victim of family violence may be seeking a variety of orders and/or an injunction, without compromising the guidelines in the National Protocol.

Stakeholders were directly asked to nominate whom the duty lawyer should prioritise when there are allegations of family violence. They were provided with choices ranging from the alleged victim to the alleged perpetrator as well as at the duty lawyer's discretion or at the judge's direction.¹⁸⁰ There were mixed reactions to this question, which attracted a significant number of comments. Some respondents sought to apply principles of equity to suggest that, ideally, both parties should be represented. While these comments relate to access to justice issues and are laudable, they fail to recognise the reality of limited Legal Aid funding and resources; however, the majority of responses were consistent with the stakeholder who said, 'It may be a case of first in'.¹⁸¹ Given that the responses were anonymous, it is likely that this was an honest opinion.

¹⁷⁹ Ibid [3.1], referring to the court's considerations in *T & S* [2001] FLC 93-086.

¹⁸⁰ Chapter IV: Part III: D: Table 43, Question 22 sought stakeholders' views on whether the duty lawyer should prioritise victims of family violence.

¹⁸¹ Ibid see Comments: Stakeholder 27.

A comment by a member of the court staff considered that this was the duty lawyer's decision, and would depend upon how much time they had and how many other matters needed their attention. This comment deserves more weight than the 'motherhood' statements about equity because court staff see the duty lawyer in action and recognise the time constraints and pressures on their time.

In reality, the duty lawyer may not know if a referred SRL is the alleged victim or perpetrator until they speak to them. If the duty lawyer is directed by a judge to assist a particular SRL, which one stakeholder suggested should be the way priority is assessed; the duty lawyer may find it difficult to refuse the judge's request, regardless of the SRL's status. Given the responses from the judges, it may be assumed that the duty lawyer will be directed to assist the alleged victim, but that may not always be so.

The Protocol provides that it is the duty lawyer's decision, and that decision is final.¹⁸² This provision allows duty lawyers to use their discretion and not be subject to pressure from the court or SRLs.

The results do not clearly establish what matters or SRLs the duty lawyer should give priority assistance to, despite general agreement that the purpose of the duty lawyer role is to assist vulnerable SRLs and that victims of family violence are the most vulnerable people in the family law system. The majority of the stakeholders indicated that the duty lawyer should prioritise attendance on a 'first come' basis.

(f) Providing advice and representation to people not eligible for legal aid

In the main, judges thought that the purpose of the Scheme was to provide assistance to people who were unable to get legal aid,¹⁸³ and particularly in children's matters and where there were allegations of family violence. The duty lawyers added they have assisted SRLs in relation to a small property pool or

¹⁸² *Protocol*, above n 47 [3.3]

¹⁸³ Chapter IV: Part I: B.I.B: Interviews: Judges 1, 2 and 3.

where the dispute is about who remains responsible for a debt.¹⁸⁴ The stakeholders' clear view was that the duty lawyer give priority to children's matters. Least important were property matters, although there was some recognition that assistance should be given even then if family violence is involved. The Scheme accommodates the representation of SRLs in property matters in such cases.

The question assisting people who fall through the large gap between legal aid and private representation may be addressed by considering interstate initiatives. VicLA has indicated that in some circumstances where property matters are in dispute a means test may be applied.¹⁸⁵ While the income and debt levels in Tasmania may be lower than interstate, there is no reason why a means test cannot be introduced or a modest contribution paid by SRLs in property matters. VicLA has recommended that a pilot duty lawyer scheme be put in place using the EIU model. One of the associated recommendations is that it be means tested and possibly attract a contribution.¹⁸⁶ It was not part of this study to explore this issue with participants and therefore the final chapter containing recommendations does not assess whether LACT should change its policy in relation to contributions. It is noted, however, that the review of LACT recommended that duty lawyer services be the subject of means testing.¹⁸⁷

5.3 RQ3: What is the impact of the Scheme on SRLs and other key participants in the family law system?

The central issue of this study was to assess SRL's and stakeholders' views of the impact of the Scheme. A common theme throughout the literature is that the involvement of SRLs has an adverse impact on the court by causing delays and

¹⁸⁴ Chapter IV: Part I: B.I.C: Comments: researcher.

¹⁸⁵ PwC, Legal Aid Funding, above n 32. It is reported that without the duty lawyer's assistance in the Family Courts, matters involving SRLs would be 5% more inefficient, vi. The report deals extensively with 'inefficiency due to lack of duty lawyers', and recommends the extension of duty lawyer services, 41. The funding basis for the report is from Legal Aid Queensland, 2007–08 and shows the cost of representation by in-house family lawyers at \$4,143 unit cost per file, against \$615 for duty lawyer attendances.

¹⁸⁶ VicLA, above n 74.

¹⁸⁷ Peter Evans, *Review of Legal Aid Commission of Tasmania*, Report to the Attorney-General for the State of Tasmania (27 March 2015).

using valuable resources, and that self-representation puts pressure on everyone in the court system, not least the SRLs.¹⁸⁸

The literature has found that SRLs create problems for judges, who stressed the importance of remaining impartial and avoiding perceptions of bias by the other party.¹⁸⁹ Judges in this study said they were aware that any assistance they gave to an SRL might be viewed by the other party as having a bearing on their case because the SRL is getting 'free advice' whereas they are paying their lawyer.¹⁹⁰ While this may be a blinkered view, it is something the judges were aware of.

(a) Impact on SRLs

SRLs who had received assistance from the duty lawyer were asked a series of questions to determine what impact the Scheme had on them and whether they felt that self-representation disadvantaged them in any way.¹⁹¹ They thought their matter would proceed through the court more quickly and the outcome would be better if they had the help of the duty lawyer.¹⁹² Apart from one SRL, all those who had used the duty lawyer service rated the Scheme positively and said they felt better after seeing the duty lawyer.¹⁹³ These results suggest that the assistance of the duty lawyer relieved stress on the SRL.

The responses of SRLs to how they felt self-representation had an impact on them indicated that they felt 'rushed or pushed' by almost everyone in the family court system except the duty lawyer.¹⁹⁴ This response should be treated cautiously because it is not the entire story of how SRLs felt, and should be viewed alongside other responses, for instance, that that they did not have

¹⁸⁸ Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice* (Final Report, 2004), Chapter 10: Self-Represented Litigants, [10.70] where the adverse effects of self-representation are discussed in detail; also see Chapter I: D Effects of Self-Representation and Dewar, Smith and Banks, above n 45.

¹⁸⁹ Sourdin and Wallace, above n 42.

¹⁹⁰ Chapter IV: Part I: B.I.B: Interviews: Judges 1, 2 and 3.

¹⁹¹ Chapter IV: B.I.A: Table 18, Question 13 and Table 19, Question 14.

¹⁹² *Ibid* Table 13, Question 24.

¹⁹³ *Ibid* Table 20, Question 17.

¹⁹⁴ *Ibid* Table 19, Question 14.

sufficient time with the duty lawyer and that, possibly, some SRLs will always be aggrieved about aspects of the system.¹⁹⁵

Generally, SRLs said they considered self-representation disadvantaged them and affected their health and wellbeing. They were particularly critical of having to appear before a judge; three said they felt rushed or pushed by the judge into making a quick settlement or moving the matter along through the court.¹⁹⁶ Two said that the other party's lawyer also rushed or pushed them. The implications are that SRLs feel stressed by legal professionals. Frustration was also expressed by judges and lawyers about the impact of self-representation on them personally and on the court system.

Two judges commented on the emotional benefits to an SRL of having face-to-face contact with a duty lawyer as distinct from other sources of assistance.¹⁹⁷ It was also considered that an experienced duty lawyer could calm an angry or frustrated SRL.¹⁹⁸ The duty lawyers thought their involvement reduced the stress on SRLs. They encouraged SRLs to look to other less aggressive means of resolving their dispute. The researcher noted that not many SRLs had thought of mediation as an option or even a pre-trial procedure.¹⁹⁹ The responses of the duty lawyers confirmed findings in the literature 'that referrals of SRLs to other services which will assist them resolve their dispute is an important component of the duty lawyer service and avoids the emotional drain of litigation'.²⁰⁰

The researcher and the Launceston duty lawyer felt that they could reassure people, be supportive, and lessen the impact of court proceedings.²⁰¹ This approach received favourable comment from one of the judges, who advocated

¹⁹⁵ Macfarlane, above n 42. Macfarlane makes it quite clear that this is a secondary factor to the role of affordability and the insensitivity of the system to the pressures they face.

¹⁹⁶ Chapter IV: Part I: B.I.A: Table 18, Question 13.

¹⁹⁷ Ibid Chapter IV: Part I: B.I.B: 2 Interview: Judge 2 and Interview: Judge 3. Judge 2 noted the benefit of a duty lawyer as 'someone to talk to who will understand what's going on in ... court. ... [and being able to] sit them down, offer them a glass of water or a cup of coffee and ... on a one-to-one.'

¹⁹⁸ Ibid.

¹⁹⁹ Chapter IV: Part I: B.I.C: Comments: researcher.

²⁰⁰ Forell and Cain, above n 44.

²⁰¹ Chapter IV: Part I: B.I.C: Interview: LDL and Comments: researcher.

the one-to-one approach in providing advice to SRLs.²⁰² This indicates an awareness that the court is a stressful place for SRLs where they need support. While the duty lawyers agreed that they should provide emotional support, they clearly had little time to sit down with SRLs over a cup of coffee. Nevertheless, the sentiment is sound and offers scope for the Scheme to accommodate an approach offering additional time outside the 'pressure cooker' environment of the court.

The broader approach to meeting SRLs' needs as expressed by the legal professional participants in this study is in keeping with research which supports a 'client-focused'²⁰³ and 'front end'²⁰⁴ approach to the resolution of problems rather than looking solely at legal remedies.

(b) Impact on the judge

All judges said that SRLs have a significant impact on court processes and present a problem for the court. In the context of acknowledging the assistance of ICLs when SRLs are involved, one of the judges said that the ICL helped the court 'quite extensively', and that otherwise 'I would have to be ... helping them'.²⁰⁵ The judges admitted that SRLs cause concerns for them and agreed that the duty lawyer reduced the amount of information and time they need to provide SRLs. They implied that being able to refer an SRL to a duty lawyer present in the court has increased court efficiency, allowed the judges to do their job, and helped them maintain impartiality when giving legal assistance. Their only complaint was that there were not enough duty lawyers available with sufficient frequency.

The researcher and the Launceston duty lawyer were sympathetic to the stress judges, court staff and family law practitioners experienced when SRLs needed help. The Launceston duty lawyer said she 'wished the judge would use me

²⁰² Chapter IV: Part I: B.I.B: Interview: Judge 2.

²⁰³ Schetzer, Mullins and Buonamano, above n 122.

²⁰⁴ VicLA, above n 74.

²⁰⁵ Chapter IV: Part I: B.I.B: Interview: Judge 3.

more²⁰⁶ in recognition that she could relieve the judge of some of the burdens of self-representation.

All the judges and stakeholders recognised the benefits of the duty lawyer's intervention in that it relieved SRLs from the stress of managing their dispute alone.

(c) Impact on family law practitioners and Independent Children's Lawyers

Previous literature has found that judges rely heavily on ICLs when SRLs are involved in a matter,²⁰⁷ and that ICLs who are asked by a judge to help an SRL face problems, both because they are not adequately remunerated and because their involvement may lead to perceptions or allegations of bias.²⁰⁸ There were nine ICL respondents in the stakeholder survey. Their comments confirmed their concern that either the SRL or the other party 'may reach the conclusion that the ICL is biased'²⁰⁹ and if their involvement led to the abandonment of the proceedings it could create 'significant problems and expense'.²¹⁰ ICLs commented on the stress they suffered as a result of judges increasingly asking them to assist SRLs at trials. Their responses indicated that this is where the duty lawyer can be of most use to the court system. ICLs considered the intervention by a duty lawyer allowed them to work without the distraction and additional responsibility of having to assist SRLs. This would also protect the ICL against allegations of bullying from an SRL or perceptions of bias by the other party.

This situation may be exacerbated in Tasmania given the small numbers available for appointment. ICLs are appointed by the Legal Aid Commission.

²⁰⁶ Chapter IV: Part I: B.I.C: Interview: LDL.

²⁰⁷ Justice Michael Le Poer Trench, 'Unrepresented Litigants – At Home and Away', (Presentation at Assisting Unrepresented Litigants – A Challenge for Courts and Tribunals Conference, Australian Institute of Judicial Administration, 15–17 April 2014, Sydney).

²⁰⁸ Rachel Carson, Rae Kaspiew, Sharnee Moore, Julie Deblaquiere, John De Maio and Briony Horsfall, 'The Role and Efficacy of Independent Children's Lawyers: Findings from the AIFS Independent Children's Lawyer Study' (2014) 94 *Family Matters* 58.

²⁰⁹ Ibid.

²¹⁰ Ibid.

Tasmania has a panel of 23 lawyers in private practice state-wide who are accredited ICLs. LACT has another six ICLs who are in-house lawyers. At any time, given leave arrangements, professional commitments and conflicts of interest,²¹¹ there may be only a handful of private lawyers available to be appointed as an ICL. In a small jurisdiction like Tasmania, where the number of difficult and complex cases appears to be disproportionate to the size of the population, the same ICLs appear regularly. This alone puts pressure on these practitioners.

In general, the majority of stakeholders considered that a duty lawyer should be 'a constant presence',²¹² but there was no consensus about whether the duty lawyer should always be available to assist when both parties are unrepresented and the ICL is the only legal professional. Comments in response to this question showed some concern that extending the duty lawyer service in these situations may result in some SRLs abusing the service, pushing it to be free and continuing assistance.

Nearly half the stakeholders (N=18 of 38, 47%) considered it important that the duty lawyer be available to assist in matters where SRLs appear and there is an ICL.²¹³ This demonstrates an awareness of participants in the family law system of the need to ensure the ICL is not distracted from the performance of his or her primary duty, which is to advise the court what is in the best interests of the child. In this context, it is argued that the duty lawyer service reduces the impact of self-representation on ICLs and improves the effective running of the court. Clearly, this depends on resources.

(d) Impact on the court system

A judge commented that one of the most useful results of a duty lawyer's intervention is that it helps 'in terms of the efficiency of the way things go

²¹¹ ICLs who are also private practitioners may not be appointed if their law firm has represented or been in dispute with one of the parties in the proceedings.

²¹² Chapter IV: Part III: D: Table 42, Question 19. Also see comments: Stakeholder 31.

²¹³ Ibid Table 42, Question 19 asked stakeholders whether a duty lawyer would always be available to assist when both parties are unrepresented and the ICL is the only legal professional.

through the court'.²¹⁴ The focus on matters taking less time is an understandable response. Judges have guidelines on how to deal with SRLs,²¹⁵ but they also have to balance the level of assistance they can provide them with the need to ensure that the court operates in an efficient and effective manner. If SRLs are not dealt with in a timely way, other court users are disadvantaged. The results of this study show that the intervention of the duty lawyer helps progress an SRL's matter, contributes to the efficiency of the court, and decreases pressure on everyone involved in the court system.²¹⁶

The consensus among court staff was that they relied heavily on the duty lawyer. The high number of referrals by court staff suggest that having the duty lawyer deal with SRLs removes pressure from staff to explain the difference between the information they can provide and the legal advice SRLs need. The literature on the impact of self-representation on the family court system has dealt extensively with the work and role of court staff being misunderstood by SRLs, who demand services of them which they simply cannot provide.²¹⁷

A positive inference about the impact of the Scheme can be drawn from the high rate of referrals to the duty lawyers by almost all stakeholders who had contact with SRLs.²¹⁸ This suggests that those who have most to do with SRLs value the duty lawyer service. There was consistency in the views of all participants that SRLs place significant stress on, and demand much from, judges, court staff, the duty lawyer and family law practitioners, including ICLs,

²¹⁴ Chapter IV: Part I: B.I.B: Interview: Judge 1.

²¹⁵ *Re F: Litigants in Person Guidelines* [2001] FamCA 348 [209]. The Full Court revisited the *Johnson & Johnson* (1997) FLC 92-764 guidelines and at 215 set out the 'obligations which we consider trial judges have when hearing cases involving unrepresented litigants' [*Johnson* at part 121]. At 246, the Full Court said they would 'reformulate the *Johnson* guidelines, retaining 'what are currently guidelines 1, 2, 3, 6 and 8' and reformulate guidelines 4 and 5 and 7, adding an additional guideline at 9.

²¹⁶ See also Allen Consulting, above n 32, viii.

²¹⁷ Senate Legal and Constitutional Affairs References Committee, above n 43. This report comments on the confusion of SRLs about the legal information which court staff provide (forms/brochures etc.) and legal advice (how to complete the documentation).

²¹⁸ Chapter IV: Part III: D: Table 29, Question 8 asking whether stakeholders had referred SRLs to the duty lawyer and Table 30, Question 10 seeking the number of referrals made to the duty lawyer in the last 3 months.

involved in their matter.²¹⁹ It was generally acknowledged, not without sympathy, that SRLs themselves are negatively affected by their experience.²²⁰ Their having access to the duty lawyer was considered by respondents as a positive impact on everyone involved in the family court system.²²¹

(e) What practical difference (whether positive or negative) has the intervention of the duty lawyer made?

The responses to this question were intended to establish whether the Scheme made a positive (or other) impact on SRLs and their level of satisfaction. Overall, these results suggest the Scheme is making a positive difference to how SRLs experience their family law dispute. The common view may be summarised by the comment made by one who said ‘I may (now) understand what the hell is going on’.²²²

Overwhelmingly, SRLs who did not see the duty lawyer said that they thought it would have made a difference to their case if they had.²²³ As it is unknown at what stage of the litigation process these SRLs were involved, it is difficult to understand this response. It may be that these SRLs thought that the duty lawyer would be ‘their lawyer’, not knowing the difference between attendances limited by the Scheme and full representation. It may also be that they had unrealistic expectations of the duty lawyer role.²²⁴

An SRL who did not receive help commented that they thought they would have benefited if they had seen the duty lawyer.²²⁵ It is not clear whether this SRL

²¹⁹ Chapter IV: Part III: D: Table 41, Question 18 asking ICLs whether the judge asked them to assist SRLs and 42, Question 19 asking if a duty lawyer should be available when there are two SRLs in a matter involving an ICL; Also see Chapter IV: Part I: B.I.C: Interview: LDL.

²²⁰ Chapter IV: Part I: B.I.B: Interview: Judge 1 and B.I.C: Interview: LDL.

²²¹ Chapter IV: Part III: D: Table 38, Question 20 asking stakeholders’ views on the difference made by the intervention of the duty lawyer.

²²² Chapter IV: Part I: B.I.A: Table 12, Question 16 asked SRLs to comment about how they felt about the family court system after receiving help from the duty lawyer. See comments of SRL: 20.

²²³ Chapter IV: Part I: B.I.A: Table 13, Question 24 asked SRLs whether they thought it would have made any difference to the outcome of their case if the duty lawyer had assisted 11 of 16 said ‘Yes’, 1 of 16 said ‘No’ and 1 of 16 said ‘Don’t know’ with 3 of 16 not responding.

²²⁴ Ibid See Comments: SRL: 23.

²²⁵ Chapter IV: Part I: B.I.A: Table 11, Question 12 sought SRL’s perception of the outcome of their experience after having received help from the duty lawyer. Also see comments: SRL: 16.

was referring to the outcome they wanted, thought that the duty lawyer would be their representative, or was simply making a positive comment that the SRL thought the duty lawyer would ameliorate the impact of proceeding through the court system on their own.

Macfarlane's study of SRLs found that not everyone who gets help is satisfied with the level of assistance.²²⁶ In the current study, the satisfaction of those who had used the Scheme and were happy with their outcome, validates how the Scheme operates in Tasmania. However, not everyone was content, and some SRLs offered suggestions for improvement which were implemented during the course of this study and others which will form part of the recommendations, contained in the final chapter.²²⁷

The researcher and the Launceston duty lawyer commented that SRLs are often confused about what the duty lawyer can and cannot do for them,²²⁸ and even though the duty lawyer could not guarantee that SRLs would get the result they wanted, they were confident that their early intervention helped SRLs take more appropriate and effective action to explore options to resolve their matter, and thereby improved the outcomes. The Launceston duty lawyer said that '99 per cent' of SRLs seem to appreciate her intervention and believed that the Scheme made a constructive difference to SRLs.²²⁹

It is unsurprising that it was the common view of the judges and the view of multiple sources in this study that the Scheme performed a valuable service and improved the effective conduct of the court. In conjunction with one of the judge's views that the work of the duty lawyer is important and that 'we must not diminish what the duty lawyer does and their sense of value in themselves and

²²⁶ Macfarlane, above n 42.

²²⁷ SRLs suggested better advertising, in particular, signs in the court or inclusion in Centrelink's website; more information about the times the duty lawyer is available; that the duty lawyer be available more often than on court list days and that the duty lawyer is able to spend more time with SRLs.

²²⁸ Chapter IV: Part I: B.I.C: Interview: LDL.

²²⁹ Chapter IV: Part I: B.I.C: Interview: LDL.

their work',²³⁰ the responses suggest that the Scheme is working well in Tasmania and has much to offer those involved in the family law system.

This may be, in no small part, due to the close and cohesive relationship between the court and family law practitioners. It may also relate to the fact that the researcher and the Launceston duty lawyer have been working in that role since the introduction of the Scheme in 2005.²³¹ The EIU Evaluation comments on the importance and benefit of having mature family lawyers with at least five years' post-admission experience, to deal with SRLs who may have complex legal and personal issues.²³²

Responses from all participants were consistent with the literature that finds that any services helping SRLs are valuable.²³³ In the Hobart context, it is a strength of the Scheme that it can operate as a stand-alone service where the researcher offers discrete task assistance at different stages of an SRL's matter.

On the whole, participants were satisfied with all aspects of the service. All said that strengths of the service include the skill and experience of the duty lawyers. Although one family lawyer thought the service could operate more efficiently, the overwhelming majority of people who came into contact with the duty lawyers commented that all services provided to SRLs also improved the efficiency of the court system. There was recognition that the main advantage for SRLs is that they receive a competent, free service which puts them in a better position than being self-represented. Some SRLs complained of their limited time with the duty lawyer, and this concern is addressed in the recommendations for the improvement of the Scheme.

All participants thought that the intervention of the duty lawyer allowed court staff and legal professionals to better perform their jobs, and reduced the level of frustration. A further advantage was that the involvement of duty lawyers

²³⁰ Ibid Interview: Judge 2.

²³¹ Chapter IV, Part I: B.I.C: (b) (ii) and (ii) on background information for the Hobart and Launceston duty lawyers.

²³² Forell and Cain, above n 44.

²³³ Ibid; also see Giddings et al, above n 64.

promoted and facilitated the progress of a matter through the court and improved settlement options. The only disadvantage identified was that there are not enough duty lawyers and that the time they can give to a matter during a busy court list is limited. This is in common with other studies which look to establishing their needs.²³⁴

5.4 RQ4: What improvements could be made to the Scheme to better deliver the duty lawyer service?

In all cases this was the last question asked of participants in this study. It was an open question seeking commentary, without any options provided. Given the large number of questions posed to all groups, but particularly to stakeholders, it is not surprising that only half of the participants answered this question. In hindsight, stakeholders may have been tired by this stage and did not feel up to entering into commentary. It might therefore have been more productive if answer options had been provided, but this approach had been rejected at an early stage in consideration that they might have been leading. The comments that were received from the participants offered suggestions and strategies to move forward with some change to the delivery of the service.

The comments of the stakeholders who responded to this question offer a strong case for making legal assistance by the duty lawyer available as early as possible in the dispute process, and for expanded duty lawyer services and more time made available by the duty lawyer outside the duty list, to allow the duty lawyer to assist with discrete tasks.²³⁵ Stakeholders detailed a number of specific recommendations for change based on the advantages and limitations of the Scheme. A number of these recommendations are the subject of the final chapter.

(a) Advantages, disadvantages and/or limitations of the Scheme

The majority of stakeholders said that the main disadvantages were that there were not enough duty lawyers available and there was never enough time for

²³⁴ Macfarlane, above n 42.

²³⁵ Chapter IV: Part III: D: Question 25.

each SRL on their day in court. These responses are taken as representing a concern that some SRLs may be missing out on assistance, perhaps suggesting that the impact on court staff or family lawyers is greater than the impact on SRLs. It may also be a recognition that the current resources represented by one duty lawyer in Hobart, (the researcher), and one in Launceston, both of whom work part time, are insufficient to meet SRLs' needs.

This is consistent with SRLs' demand for more duty lawyers and more time with them. Indeed, the only comments made by SRLs were to express dissatisfaction with the lack of availability of, and time with, the duty lawyer.²³⁶ The judges also considered it would be beneficial for all involved if there was extended duty lawyer time and availability. These results are consistent with findings in previous literature which have led to recommendations for extension of duty lawyer services.²³⁷ These issues are discussed in the next chapter dealing with reforms.

(b) Enhanced Scheme

All participants said they wanted a considerably expanded Scheme. SRLs made suggestions which indicate they wanted more services. However, it is unclear whether SRLs wanted more time on the day that their matter was before the court, or time before and/or after court as well. Wanting greater availability may be interpreted as meaning that SRLs want to see the duty lawyer more than once or may want more duty lawyers, and may indicate a lack of understanding of the limited nature of the Scheme and confusion between it and the services provided by a private lawyer. SRLs thought that better access to the duty lawyer and knowing when and where they were available would also be improvements.²³⁸ It is notable that those SRLs who did receive help from the duty lawyer thought there was nothing more which could improve the service given to them.²³⁹

²³⁶ This is consistent with the findings in Macfarlane's study, see above n 42.

²³⁷ Productivity Commission, above n 23; Allen Consulting, above n 32.

²³⁸ Ibid.

²³⁹ Ibid.

The perfect situation for judges would be to have a duty lawyer on call²⁴⁰ and available every time the judge was sitting.²⁴¹ Judges also wanted the duty lawyer to help SRLs with the preparation of their affidavits, at Interim Hearings and even at Final Hearings and assist with cross-examination, particularly if family violence was an issue.²⁴² However, as experienced jurists, judges realised that this was 'pie in the sky'²⁴³ and could not be accommodated under LACs' resource constraints.²⁴⁴ The judges realistically characterised the duty lawyer service as one which could provide pre-hearing information sessions at the court or as part of a Community Legal Education Program.

The researcher and the Launceston duty lawyer thought that it would be of benefit to SRLs if they could see SRLs 'more than once'. Duty lawyers could provide more time and be 'more proactive', seeing SRLs before they filed an application and then for a 'limited follow up'.²⁴⁵ The duty lawyers' comments reflected an understanding that an SRL's needs often required more time and different services which could not be provided in the context of a busy duty list. They also noted the stressful situation created for duty lawyers in trying to meet the needs of an SRL and balance their own in-house clients.²⁴⁶

Stakeholders also saw benefit if duty lawyers could be available more often than on duty list days.²⁴⁷ The general comment was that access to justice for SRLs was limited if they could not get enough time with the duty lawyer or there were not enough duty lawyers available,²⁴⁸ balanced by the appreciation that 'the pressure of the list means that there is less time than would be helpful for some SRLs and that 'it is a difficult balance for a duty lawyer' to 'direct their time to where it will have greatest impact'.²⁴⁹ Stakeholders also indicated that there is awareness of the need to move away from a narrow approach to meeting

²⁴⁰ Chapter IV: Part I: B.I.B: Interview: Judge 2.

²⁴¹ Ibid Interview: Judge 1.

²⁴² Ibid Interview: Judge 2; Interview: Judge 3.

²⁴³ Ibid Interview: Judge 3.

²⁴⁴ Ibid Interview: Judge 1. Also see Productivity Commission, above n 23, vol 1.

²⁴⁵ Chapter IV: Part I: B.I.C: Interview: LDL.

²⁴⁶ Ibid.

²⁴⁷ Ibid; also see Chapter IV: Part III: D: Comments: Stakeholder 3.

²⁴⁸ Chapter IV: Part III: D: Table 21.

²⁴⁹ Chapter IV: Part I: B.I.C: Interview: LDL; also see Part III: D: Comments: Stakeholder 25.

SRLs' needs by offering services beyond the confines of the court. This is in line with recent research recommending an expansion of the role of the duty lawyer to offer discrete tasks and representation and 'unbundled' services.²⁵⁰

The traditional duty lawyer Scheme, in having been described as a 'last minute'²⁵¹ 'emergency room'²⁵² model, reflects the inception of the Scheme as an early intervention strategy for SRLs attending court. All participants in the study suggested that SRLs would receive the greatest benefit if they received the assistance of the duty lawyer *before* and *beyond* a court event.²⁵³

It is interesting that one judge acknowledged that there was a difficulty in implementing changes under the current system as 'all the people doing the duty lawyer Scheme are in fact lawyers doing other work for the Legal Aid Commission'.²⁵⁴ The Launceston duty lawyer commented that on call over days, she felt 'guilty' about trying to balance her in-house clients and her obligations as a duty lawyer, and agreed that the situation could be improved if a day outside the court system could be designated for her to attend solely to duty lawyer matters.²⁵⁵ This extension and enhancement of services was suggested by judges,²⁵⁶ the Launceston duty lawyer,²⁵⁷ SRLs²⁵⁸ and stakeholders.²⁵⁹ Stakeholders in particular commented that when the duty lawyer saw an SRL on the day their matter was in court, there was never enough time to give sufficient advice.²⁶⁰ General comments from stakeholders were reflected in the

²⁵⁰ Productivity Commission, above n 23, vol 2, 804–5.

²⁵¹ Ibid vol 1, 519.

²⁵² Ibid 515.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Chapter IV: Part I: B.I.C: Interview: LDL.

²⁵⁶ Chapter IV: Part I: B.I.B: Interview: Judge 2.

²⁵⁷ Chapter IV: Part I: B.I.C: Interview: LDL.

²⁵⁸ Chapter IV: Part I: B.I.A: Question 25 asked SRLs to comment on any improvements to the Scheme.

²⁵⁹ Chapter IV: Part III: D: Question 25 asked stakeholders to comment on any improvements to the Scheme. Also see Comments: Stakeholder 25.

²⁶⁰ Ibid.

one which said that 'it would be helpful' if duty lawyers could be available on other occasions than call overs, if requested'.²⁶¹

Others said there were 'not enough duty lawyers'.²⁶² These comments were tempered by some stakeholders who thought it would be 'inequitable' if there was an 'overloading' of duty lawyer work and SRLs received assistance throughout the life of their matter.²⁶³ Clearly stakeholders did not consider that SRLs should receive unfettered services, although all considered that duty lawyer services provided advantages if offered at different stages of the proceedings or delivered in innovative ways through clinic sessions outside a duty list.

Responses to this question suggest that improved and expanded services offer greater access to justice outcomes for SRLs, but that the service should be well timed and targeted to children's matters and in family violence matters, and not limitless.

(c) Increased awareness

Previous reference has been made to SRLs' lack of knowledge about the Scheme and their suggestions for raising awareness about it.²⁶⁴ By far the greatest number of suggestions on how Scheme awareness could be improved came from the stakeholders. A number of family law practitioners thought that the Scheme could be better advertised²⁶⁵ while others said it should be made clearer 'what the duty lawyer can and cannot do'.²⁶⁶

Every participant in this study thought there was insufficient information available about the duty lawyer. In general, participants thought that SRLs would have appropriate access to justice if they knew when and where the duty lawyer could be found and how the service could meet their needs.

²⁶¹ Chapter IV: Part III: D: Comments: Stakeholder 3. 'Call overs' are another term for duty list days or the first return date for an application in the FCC.

²⁶² Ibid Comments: Stakeholder 25.

²⁶³ Ibid Comments: Stakeholder 31.

²⁶⁴ Chapter IV: Part I: B.I.A: 4.4 (ii).

²⁶⁵ Chapter IV: Part III: D: Question 25, Comments: Stakeholder 5; Stakeholder 32.

²⁶⁶ Ibid Comments: Stakeholder 25.

B Conclusion

The main conclusions which emerge from this analysis are:

1. All participants want and value the duty lawyer service;
2. All participants want a service that can be expanded to provide a range of services to SRLs at any stage of their family law matter;
3. All participants rate it important that SRLs receive assistance with their documents and need information about procedural matters;
4. Duty lawyers perform valuable roles representing SRLs in court, in giving them reality testing, referrals and negotiating on their behalf;
5. The Scheme improves access to justice for SRLs but could do more to fill the gap between duty lawyer services and full representation; and
6. There needs to be more information made available about duty lawyer services.

On the whole, the results support a view that, based on the measures of benefit, timeliness and usefulness, the Scheme assists in improving the effectiveness of the family court system. It received high praise from virtually all participants in the study, who wanted to see more duty lawyers giving more time to SRLs both before and at different stages of their litigation. Generally, the only criticism was that awareness of services offered by the duty lawyer needed to be increased so that everyone involved knew what the duty lawyer could (and could not) do and when and where they were available.

The results of this study indicate that the Scheme provides access to justice for SRLs by meeting multiple aspects of an SRL's legal needs.²⁶⁷ However, restrictions limiting the attendance of the duty lawyer to SRLs on the day their matter is in court, and only attending to an SRL on one occasion creates stress for SRLs and others involved. This is consistent with recent reports which advocate assisting SRLs by providing them 'unbundled legal services' which are

²⁶⁷ Commentators find that SRLs usually have multiple health and disability issues as well as complex legal problems. See Coumarelos et al 2012, above n 42, xvi; Schetzer, Mullins and Buonamano, above n 122.

‘wider than the last minute assistance duty lawyers typically provide at the court door’.²⁶⁸

While each category of participant may have provided feedback demonstrating a degree of self-interest, overall there was an appreciation that the Scheme plays a critical role in providing a range of services which facilitate access to justice and help all participants in the family law system. There were valuable suggestions on how the Scheme could be better promoted and adapted to extend the benefits for those who use it.. The statistics showing the increased use of the service in Hobart, despite the researcher reducing her hours to one day per week, suggest that the Scheme is flexible and able to accommodate the needs of its users.

All participants in this study recognised an obligation for all those involved in the courts to ensure SRLs receive fair treatment. The Scheme may not offer, as one respondent to the stakeholder survey said, equal treatment, but it is equitable.²⁶⁹ The Scheme fulfils the general principles outlined in the National Protocol, but it could do more by providing a wider range of services in an extended timeframe.²⁷⁰ The next chapter presents recommendations based on the results of this study, in the form of a practical guide to how the Scheme may be improved to have a greater impact on SRLs in the Family Courts.

²⁶⁸ Productivity Commission, above n 23, vol 1 495, citing Samreen Beg and Lorne Sossin, ‘Should Legal Services Be Unbundled?’ (2012) *Articles and Book Chapters*, Paper 828. This article cited Canadian and United States studies which showed that representation positively influenced outcomes and compared: see James Greiner and Cassandra Wolos Pattanayak, ‘Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?’ (2012) 121 *Yale Law Journal* 2118, which found virtually no credible quantitative information on the effect of legal representation.

²⁶⁹ Chapter IV: Part III: D: Comments: Stakeholder 25.

²⁷⁰ *Protocol*, above n 47 [1.1] to [1.3].

Chapter Six

Conclusions and Recommendations

This chapter summarises the conclusions of the study and outlines recommendations for the review of the Scheme in Tasmania, based on the results of the study and recent research. The recommendations are consistent with the literature on legal assistance services. If changes are made to the Scheme, they should be evaluated after a 12 month period to assess their effectiveness. This future research will be an important guide for other jurisdictions with limited resources to assess whether similar changes could be implemented there.

A Conclusions

This thesis provided the historical background and explored the philosophical underpinnings leading to the introduction of the Scheme in Australia. It considered similar schemes, elsewhere in Australia and internationally. The Scheme in Australia is unlike any other, either in the criminal jurisdiction or in family law jurisdictions, although it has some features of the Summary Advice Counsel initiatives in some provinces in Canada. The national jurisdiction of the Scheme, covering all family courts, offers significant governance benefits through a National Protocol, and its operation through state and territory LACs ensures uniformity of service and standards of delivery.

Recent reports and evaluations of legal assistance services were reviewed to establish that the Scheme plays an important role in providing access to justice for SRLs. Moreover, it is a cost-effective way of delivering legal aid services which benefit LACs and create efficiencies for the family courts.

The results of the empirical research in this study correlate with the literature that the Scheme is highly rated as a facilitator of services for SRLs and the court system. There was strong consensus among the participants that there should be more duty lawyer services made available, more often. This is not a

surprising result. Merely because participants want more services does not justify why the duty lawyer service needs to be expanded. The reasons behind the expansion and explanation of how these services make better use of existing resources are addressed later in this chapter.

The expansion of the Scheme was recommended as long ago as the first Senate and Constitutional References Committee report in 2004¹ and, again, in its 2009 report.² The Legal Aid Commission of NSW ('LANSW') conducted their own pilot scheme, leading to the creation of LANSW EIU which moved away from the traditional model of duty lawyer services offered only on the day an SRL's matter is in court. An evaluation of the EIU found that extension of the duty lawyer services, in terms both of the number of lawyers and of the range of services they provide, created benefits for SRLs and the courts. The recent reports on the economic value of legal assistance services describe the services provided by duty lawyers as 'unbundled' services and consider that duty lawyers performing limited and discrete tasks at different stages of an SRL's proceedings offer clear advantages over the traditional model where a duty lawyer attends an SRL on the day their matter is in court.³

This thesis drew on the EIU model to develop and introduce changes to the researcher's duty lawyer practice in Hobart as part of the action research process. The data confirm the commonly held view that the earlier the duty lawyer assists an SRL, the better the outcome for all concerned. All participants in this study considered that there were limits to what a duty lawyer could do for an SRL during a busy court duty list. Most wanted duty lawyers to assist SRLs before they filed proceedings in the expectation that, at the very least, documents would be better prepared. Assistance with documents was

¹ Senate Legal and Constitutional Affairs References Committee, *Inquiry into Legal Aid and Access to Justice* (Final Report, 2004) [10.70] 198.

² Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (2009).

³ PricewaterhouseCoopers, ('PwC') 'Legal Aid Funding: Current Challenges and the Opportunities of Co-operative Federalism' (November 2009) ('Legal Aid Funding'); PricewaterhouseCoopers, ('PwC') 'Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law' ('Economic Value') (Report for National Legal Aid, 2009); Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions* (2014) ('Allen Consulting'); Australian Government Productivity Commission, *Inquiry into Access to Justice Arrangements* (Final Report No 72, 2014) vol 1 & 2, ('Productivity Commission').

identified in the literature⁴ and in the results of this study⁵ as one of the more helpful services duty lawyers could provide. For example, SRLs said they did not know which forms to use or what type of documentation was needed and there was no explanation about how to correctly write orders. The researcher found that each form on the family court websites included multiple links and references to other forms and procedures and websites and noted how easy it would be for SRLs to be confused. Early intervention by the duty lawyer in preparing documents before an SRL filed their application in the court would at least allow them to begin the process on a more level playing field and ensure that their matter proceeds more quickly through the court and, possibly, achieve a better outcome. This will save the family court system time and money.

The literature and the results of this study show that most referrals to duty lawyers come from court staff and that the court is often the first point of reference for SRLs. Duty lawyers can offer SRLs more help than any other current service in the one place, on site at the court. The data suggest that extension of the duty lawyer time to offer unbundled services makes the best use of Legal Aid's existing resources. By providing advice and representation, often in urgent, sensitive matters involving family violence and to people who have mental health issues, which can facilitate the resolution of matters or narrow the issues in dispute, duty lawyers reduce the impact of litigation on

⁴ Suzie Forell and Michael Cain, 'An Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service', (Law and Justice Foundation of New South Wales, November 2012). Table 6 in Forell and Cain: Number of categories of assistance per matter, Parramatta EIU duty service, July–August 2012, 16. The report cites a comment from a Registry Manager that duty lawyers assisting with documents meant that there were 'less mistakes as it went through the system'. Cate Banks, 'Evaluation of the Effectiveness of the Queensland Public Interest Law Clearing House Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane' (Cate Banks Consulting, June 2013). This report lists the preparation of court forms and documents as one of the 'top 3 barriers' for SRLs in family court proceedings. Family Law Council, 'Litigants in Person: A Report to the Attorney-General' (August 2000), 81; Barry Smith, 'Study on the Effects of Legal Aid Cuts on the Family Court of Australia and Its Litigants' (Research Report No 19, Family Court of Australia, 1999), 81. This report said that SRLs filing inadequate and inaccurate documents impeded the progress of matters through the courts; Productivity Commission, above n 3, vol 1, 158. This report noted that the 'unbundled services' provided by duty lawyers in assisting SRLs with documents set them on the right path and meant that SRLs may be able to manage their own matters.

⁵ See Table 37 where N=37 of 38 stakeholders commented that the duty lawyer's assistance with documents was 'very important' or 'important' and Chapter IV, B Pt 2 (iv) where judges said matters progressed more quickly through the court when the duty lawyer assisted SRLs with the preparation of their documents.

SRLs and the demands on court time and resources. Duty lawyers offer maximum value to the maximum number of SRLs.⁶

The benefit of SRLs receiving this assistance through a face-to-face service was recognised by all participants in this study. The duty lawyers offer SRLs more help than any other current service in the one place, on site at the court. The data suggests that extension of the duty lawyer time to offer ‘unbundled services’ makes the best use of Legal Aid’s existing resources. Duty lawyers are cost-efficient and offer maximum value to the maximum number of SRLs.⁷

All participants agreed that the intervention of the duty lawyer offers significant advantages to all those involved in the family law system and ameliorates the impact of a person appearing unrepresented on everyone involved, in particular the SRLs themselves. The professional respondents recognised that the duty lawyer service on the day an SRL’s matter was in court was constrained by lack of time. They were conscious of the benefits of the service being provided to SRLs on more than one occasion and that many SRLs needed further assistance or representation beyond the day their matter was in court. The results demonstrate that the legal professionals involved in the system think it is important that SRLs receive duty lawyer assistance as a way of providing them fair treatment, and that the Scheme goes some way towards achieving this.

Nevertheless, apart from the SRLs who want the duty lawyer to help with ‘everything’, it is recognised that there should be constraints on the number of times a duty lawyer attends on an SRL, as some SRLs may take advantage of a free service. The duty lawyers acknowledge that they see people on more than one occasion as people involved in family law disputes usually need help with more than one problem; the National Protocol allows duty lawyers the discretion to make such a decision.

⁶ Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*, Law Foundation of Ontario, Law Foundation of Alberta, Law Foundation of British Columbia/Legal Services Society of British Columbia, (May 2013), 122.

⁷ Ibid.

The researcher and the Launceston duty lawyer believe that their considerable experience makes them mindful of the need to reinforce to SRLs that theirs is not a service providing continuous assistance. The EIU provides assistance on more than one occasion, by differentiating categories of assistance provided.⁸ There is no rule about the number of times the duty lawyer sees people and the research indicates that early intervention legal services can contribute towards alleviating the broader impacts and associated costs of legal problems.⁹ Meeting the legal needs of SRLs can be done without increased funding but through initiatives to support increased service delivery. It is more cost effective to use the existing duty lawyer resources in a more flexible way to enable the service to respond to the gaps identified in the literature and by participants in this study.

All participants saw the benefit in the duty lawyer spending time with SRLs earlier in the process. It was also important that SRLs receive additional time. The results from the legal professionals illustrated that the existing duty lawyer services were insufficient to meet the likely future needs of an increasing number of SRLs with multiple legal and non-legal problems. Those professionals also recognised that not everyone appearing in family law disputes should receive legal aid but that there are also benefits to the profession and the court if people who need assistance and are otherwise ineligible for legal aid are helped by the duty lawyer.¹⁰ The PricewaterhouseCoopers report found that the services provided by duty lawyers, 'both in terms of diversion from the court and increased court efficiency

⁸ Forell and Cain, above n 4, 16.

⁹ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigan Wei, Reiny Iriana and Stephanie Ramsey, 'Legal Australia Wide Survey: Legal Need in Australia' (LAW Survey) (Law and Justice Foundation of NSW, Sydney, 2012), <[http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/\\$file/](http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/)"LAW_Survey_Australia.pdf"> ('Coumarelos, et al 2012'). These problems were identified by the LAW Survey as including impacts on health, finances and relationships.

¹⁰ PwC Legal Aid Funding, above n 3. This report finds that the funding constraints and eligibility requirements of LACs mean that there are some worthy cases which do not receive funding. The report says that this 'unmet demand is expected to increase in an environment where the underlying cost of individual cases is increasing, i.e. fewer cases can be funded with the same amount of money.' This finding also mentions that the rising costs of legal services also contributes to the growing number of people who continue through the family courts unrepresented. This results in fewer people being assisted either through a grant of legal aid or by a private lawyer, therefore increasing the demand for duty lawyers.

resulting from legal representation and assistance' was more cost effective than grants of aid either to private practitioners or an in-house legal aid lawyer.¹¹

The conclusion that the Scheme is a better use of taxpayers' funds than the existing alternatives such as grants of legal aid or non-legal services for supporting SRLs in family law matters is supported by the data and the research. The researcher worked through the internet resources on family court and other websites and noted that the sites were not easy to navigate. Commentators have cautioned about service providers relying too heavily on internet services which disadvantaged people may not be able to understand and use and nominated face-to-face services as more helpful to SRLs.¹²

While Alternative Dispute Resolution ('ADR') services are cost effective and may be of assistance in some circumstances, SRLs who are applying for Court Orders and had experienced family violence are precluded from using ADR. Of course, many SRLs may choose to participate with mediation, using the 'shuttle' system.¹³ The duty lawyers commented that not many SRLs they had dealings with considered mediation as a viable option. Even though reports found that

¹¹ PwC, Legal Aid Funding, above n 3, Chapter 5, 23-42. A cost-benefit analysis was undertaken as part of this study which modelled a justice system without duty lawyers and one where duty lawyers are involved to analyse the direct impact of duty lawyers on the court system. It found that duty lawyer services 'would have significant net benefits to the justice system, particularly because they provide early intervention and prevent matters from being escalated unnecessarily through the system'. v; The report concluded that duty lawyer assistance provided a 5 per cent efficiency benefit to the courts compared to a situation where SRLs were without duty lawyer assistance, 24; also see Allens Consulting above n 3; Productivity Commission, above n 3.

¹² See Julie Grainger, 'Litigants in Person and the Civil Justice System—Learning from NZ, the US and the UK' (Report: The Winston Churchill Memorial Trust of Australia, 2013); Also see Bridgette Toy-Cronin, *Keeping up Appearances: Accessing New Zealand's Civil Courts without a Lawyer* (PhD Thesis, University of Otago, Dunedin, 2015); Coumarelos et al, above n 9. The LAW Survey comments on the difficulties people experience with internet-based services and that they 'do not replace the need for face-to-face services'...recognising that many of the most disadvantaged do not have the personal circumstances that support effective use of internet based, telephone, or hard copy information.' Allen Consulting, above n 3, 29.

¹³ The 2006 reforms to the FLA resulted in provisions that people who allege family violence in family law disputes are exempt from participating in dispute resolution processes, see FLA s60J; also see Commonwealth Attorney-General's Department, *The New Family Law System: Summary of the Main Changes and how they Affect Family Relationship Practitioners*, (July 2006), 367.

many people reached agreement, either full or partial, through mediation,¹⁴ not one SRL in this study considered they would attend mediation if the duty lawyer recommended it as an alternative way of resolving their dispute. The Productivity Commission noted that LANSW EIU duty lawyers make an important contribution by seeing people first and then diverting them to mediation. This view sees duty lawyers as giving both legal and non-legal options to people and therefore offering better targeted services.¹⁵ The research and the data support that the Scheme makes optimal use of scarce resources by increasing SRLs' access to early legal advice and assistance which allows them to take appropriate action to progress or resolve their family law disputes efficiently and effectively.¹⁶

With the exception of the judges and the duty lawyers, there is some confusion amongst participants as to what services the duty lawyer can provide and on what occasions private practitioners, who have an SRL on the other side of their matter, can call on the duty lawyer to intervene. The data, therefore, show a need for clarification and communication to both legal and non-legal users of the Scheme as to what services are within the remit of the duty lawyer. The recommendations in relation to raising awareness consider ways this could be achieved.

It is acknowledged that merely because the participants in the study say they want more from the Scheme, this should not automatically occur. However, the recommendations offered here are consistent with the findings from the data and recent research and the initiatives applied by the EIU, which have demonstrated that increased capacity results in better outcomes for all

¹⁴ Productivity Commission, above n 3, vol 1, 293 citing LANSW Submission DR 189, 16 which said that in 2012-13, 44% of the 172 mediations conducted achieved full agreement while a further 44% achieved partial agreement.

¹⁵ Productivity Commission, above n 3, vol 1, 522. Also, see Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30(1) *Journal of Law and Society* 156. Hunter suggests that SRLs may not be inclined to believe in ADR because they want a more aggressive approach or it has failed them in the past.

¹⁶ Forell and Cain, above n 4, iii.

concerned and that enhanced duty lawyer schemes provide significant cost benefits to LACs and the courts.

Expansion of the duty lawyer service should have a positive impact on court processes and outcomes for SRLs. If it were possible to provide additional time for each SRL so as to better prepare them for their family law matter, there may be a decline in the number of court appearances for each SRL. If more SRLs could see the duty lawyer, it may be that fewer SRLs would require legal aid services, resulting in cost savings for LACs. The findings from the research were that there was not enough time when duty lawyers were available and that more than one attendance was often required.¹⁷ Obviously, the cost implications of an extended service need to be considered. It is the researcher's view that that extending duty lawyer time is a better use of Commonwealth resources as opposed to the alternative of providing additional funding for LACs. Improving the delivery of the service is a worthwhile initiative which would allow for more help to be given to more SRLs without funding the cost of full representation.

There are no financial barriers to expanding duty lawyer services in Tasmania as funding provided by the Commonwealth to the LACT was not fully allocated to duty lawyer services. The duty lawyers work within the existing FTE arrangements of the LACT but show flexibility within the existing service arrangements to respond to identified demands. By providing extra time by appointment on a day dedicated to providing legal advice and assistance, the duty lawyers would be able to address a wider range of legal problems and see a greater number of SRLs than they currently do. This means that there would be a better focus on addressing most of an SRL's needs. Given that other resources do not extend to meeting the needs of SRLs in family law disputes, this would be a key improvement, allowing better delivery of the service.

The Scheme was introduced with an understanding that it is important to help SRLs with family law disputes. The views of people who interact with the

¹⁷ Macfarlane, above n 6, 13. SRLs complained about the limited time Summary Advice Counsel offered.

Scheme should be carefully considered in developing improvements to it. The results of the research indicate that there would be benefits in optimising access to the service by expanding the level of assistance offered to SRLs. Introducing a day each week during which SRLs would have access to the duty lawyer without the distraction of a duty list would enhance access to legal assistance for SRLs by providing them extra time as well as reducing their stress by allowing them to be seen in a face-to-face interview outside the confines of a duty list. This would also provide an opportunity to allow the duty lawyers to have the time to respond to the complex and diverse needs of SRLs presenting with family law problems.

This thesis has shown that even though the researcher reduced her workload to operate the service on only the two duty list days each month from March 2012,¹⁸ duty lawyer attendances increased in each reporting year thereafter.¹⁹ The researcher would argue that this increase was largely due to the changes the researcher made to her practice as part of the action research process.

The Scheme already represents a cost-efficient way of offering a range of services which are in high demand. The Scheme has the capacity to be more effective in meeting legal needs if it operates an extended and enhanced service in Tasmania. The reports examining the funding of legal assistance services directly support duty lawyer programs that advance access to justice for SRLs as representing value for money because they are more cost-effective than grant allocations to private and in-house practitioners through LACs.²⁰ Funding of duty lawyer services recognises that unresolved legal problems are costly and cause great emotional, physical and mental stress on those who cannot afford private lawyers or are not eligible for legal aid.²¹ In many cases, people who need legal help also have other problems. The duty lawyer can

¹⁸ See Chapter IV: Part 1:B.I.C; also fn 150, 255.

¹⁹ Legal Aid Commission of Tasmania, *Annual Report 2013–2014* (2014) notes that duty lawyer services at the Commonwealth courts doubled from the previous year. *Annual Report 2014–2015* (2015) notes that a further 17% increase in duty lawyer services at the courts from the previous year. Also see Chapter IV: Part II: C: 3 (i) for duty lawyer statistics each financial year from 2011 to 2016.

²⁰ Productivity Commission, above n 3; PwC, *Legal Aid Funding*, above n 3.

²¹ Coumarelos et al (2012), above n 9.

refer them to non-legal services which enables their problems to be dealt with in a more holistic way and which can result in better outcomes than directing people through the courts.²²

The data show that if a duty lawyer can identify a problem at an early stage, the problem can often be prevented from escalating, which results in savings in court time. Alternatively, by referring SRLs to alternative dispute resolution where appropriate, an SRL's matter may be resolved quickly and more cost effectively. In this way, the duty lawyer contributes to the overall efficiency of the wider family law system and delivers better outcomes for SRLs.

By giving SRLs information about their legal rights, assisting them with documents, and in negotiations, and providing representation, the duty lawyer provides SRLs with skills and knowledge to use if they need to continue in their dispute unrepresented. This helps matters progress more quickly through the courts.

Duty lawyer services are also structured in line with the key principles of funding practice which identify them as providing a mix of services to meet SRLs' needs within available funding.²³

The Productivity Commission report found that legal aid substantially reduces reliance on other Government services and payments and that enhanced duty lawyer services are cost effective. More specifically, given that they are not means tested, duty lawyer services help the most vulnerable and disadvantaged people. The services make a significant contribution to the overall efficiency of the family law system, in particular, to the operation of the courts.²⁴ More importantly, duty lawyer services are more cost effective than

²² See the Australian Government, Attorney-General's Department, 'National Strategic Framework for Legal Assistance 2015-2020'. The Framework sets out guiding principles to achieve 'the shared goal of a national, integrated system of legal assistance that is focused on improving access to justice and maximising service delivery within available resources.', 6, <https://www.ag.gov.au/LegalSystem/Legalaidthprogrammes/Pages/National-Strategic-Framework-for-Legal-Assistance.aspx>.

²³ Ibid. Purpose, 2; Productivity Commission, above n 3, 160, citing Submission DCA 2006.

²⁴ Productivity Commission, above n 3.

grants of aid and, by addressing SRLs' multiple needs, through referrals to other services, allow SRLs access to a more holistic system which enhances service effectiveness.²⁵ The research which focused on the likely costs and benefits of reforms in the legal assistance sector found that not only were duty lawyer services cost effective and value for money, but they also enhanced access to justice and legal processes and a range of other non-legal services by ensuring SRLs were better informed and educated.²⁶

The changes already made in Tasmania to the Scheme and the recommendations for further improvements are made based on the literature, the results of this study and the researcher's experience during the course of the study. It is contended that any improvements to the delivery of the Scheme will benefit everyone involved in the family law system in Tasmania. It is hoped that this approach will have appeal for providers of the duty lawyer service in other jurisdictions that face the same challenges and financial constraints as Tasmania.

B Recommendations

Recommendation 1: That the Legal Aid Commission of Tasmania undertakes a review of the resourcing of the Scheme to explore variations in the duty lawyer practice.

The results from this study reveal a demand for more duty lawyers performing a greater range of tasks and offering services outside the day an SRL's matter is in court. Recommendations made in a number of reports on legal assistance services highlighted the value of LACs providing enhanced duty lawyer services.²⁷ Other LACs have actively changed²⁸ or are considering changing their resourcing commitments to look to different ways of meeting the demand

²⁵ PwC, Economic Value, above n 3; Allen Consulting, above n 3, 28.

²⁶ Productivity Commission, above n 3, 76 citing Coumarelos, et al, LAW Survey, 1. These initiatives have also been adopted by VicLA which is expanding family law duty lawyer services based on the LANSW EIU model. See Victoria Legal Aid, 'Family Law Legal Aid Services Review', Final Report (2015).

²⁷ Allen Consulting, above n 3; Productivity Commission, above n 3.

²⁸ Forell and Cain, above n 4.

for legal services using both additional resources and more cost-effective services.²⁹

The Productivity Commission noted a number of advantages which self-representation services provided by offering additional services, whereby the 'client is assisted to better communicate their case and the court receives the benefit of a better prepared participant in the proceedings'.³⁰

The Productivity Commission identified QPILCH as introducing 'a relatively recent initiative that provides unbundled assistance for SRLs' which received positive feedback from SRLs. Nevertheless, while acknowledging the benefit of QPILCH's services, the Productivity Commission pointed out that duty lawyer schemes already provided 'unbundled services' by doing discrete tasks for SRLs before their matter reached court, and assisted with completing documents and representing them in court, and so had much more to offer. Duty lawyers were seen as reducing the number of SRLs who may take up more of the courts' resources and save court time and money.³¹ These services were also 'less costly than grants of legal aid'.³²

Enhancement of duty lawyer services have been widely recommended as a proactive way of creating additional opportunities for SRLs to access services which will give them a better understanding of what they have to do to effectively manage their own case.³³ The types of enhanced service which would be provided fall into the category of unbundled legal services, which the Productivity Commission notes 'can efficiently and effectively assist SRLs where most needed ... in formal settings like superior courts [and that] duty lawyer [services] ... already provide a limited set of services which can be

²⁹ VicLA, above n 26. Recommendation Eight recommends a pilot program be undertaken to test duty lawyer services according to the EIU model.

³⁰ Productivity Commission, above n 3, citing Woodyatt, Thompson and Pendlebury 2011, (Box 14.1).

³¹ Ibid.

³² PwC, Economic Value, above n 3, 25.

³³ Productivity Commission, above n 3, vol 1; Allen Consulting, above n 3; PwC, Legal Aid Funding, above n 3; Jeff Giddings et al, 'Evaluation of Queensland Public Interest Law Clearing House Self-Representation Service', (Griffith University 2014); Canadian Bar Association, Alberta Region, 'The Limited Scope Retainer', <http://issuu.com/cbaalberta/docs/limited_scope_retainers_final/1?e=11945774/8207333>.

termed “unbundled” services which do not contravene legal professional rules’.³⁴ This is the model operated by the EIU, the duty lawyer services operated by LAWA and the SA Legal Services Commission, and recommended as a pilot program by VicLA.³⁵

The discrete task assistance might include one or more of the following:

- assisting with filling out forms, drafting orders and reviewing documents;³⁶
- providing information sessions for SRLs on trial and court procedure and elements of cross-examination;³⁷
- assisting in the preparation of Consent Orders following SRLs reaching agreement in court-ordered mediation.³⁸

All these functions are identified in the data as areas where SRLs need help; and if they can be provided by the duty lawyer before and outside the court day, will relieve all involved of some stress and pressure. None of these functions extend the services in the guidelines of the National Protocol. Despite the judges in this study wanting duty lawyers appearing at trials, there is no suggestion that duty lawyers should provide representation; their service should be limited to providing procedural assistance to SRLs in the context of an Information Session, explaining how a hearing or trial is to be conducted or the procedure the judge will adopt; an approach adopted in Canada.³⁹ Providing

³⁴ Productivity Commission, above n 3, vol 1, 158. This report says that ‘minor assistance [preparing court documents, drafting letters] is similar to unbundled legal services in the sense that the duty lawyer provides enough assistance for the client to then manage their own dispute’.

³⁵ VicLA, above n 26.

³⁶ Commonwealth Attorney-General’s Department, National Legal Aid, Family Court of Australia, Family Court of Western Australia, Federal Magistrates Court, *Family Law Duty Lawyer Scheme National (‘Protocol’)* (2007), <<http://www.aph.gov.au/DocumentStore.ashx?id=e5f03e8d-9478-4364-949d-f5cd75d4011f&subId=206418>>, [2.2] ‘explanation and completion of simple documentation’.

³⁷ Ibid [2.2] ‘provision of legal advice and information’.

³⁸ VicLA, above n 26; also see *Protocol*, above n 39 [2.2]: ‘representation for limited negotiations with a view to drafting consent orders’.

³⁹ Melina Buckley, *Moving Forward on Legal Aid Research on Needs and Innovative Approaches*, Report for the Canadian Bar Association (2010), 92, citing Lord Chancellor’s Department and Law Centres Federation, Legal Advice and Services, *A Pathway Out of Social Exclusion* (Lord Chancellor’s Department, 2001), 11, <www.lawcentres.org.uk/uploads/Pathway_out_of_Social_Exclusion_2001.doc>.

information sessions is considered below, under recommendations for duty lawyers to be involved in LACT's community legal education program.

In 2015, LACT developed a corporate plan which identified strategic outcomes, key strategies to achieve those outcomes, and a set of actions to be taken in support of those key strategies. One of the key outcomes it intends to pursue is to 'increase duty lawyer services' which 'contribute to the efficiency and effectiveness of the court system'.⁴⁰ In 2014–15, the Commission introduced plans for all staff aligned to the actions listed in the corporate plan.⁴¹ The proposal to increase time and provide enhanced services is in line with the LACT's management plan.

If the duty lawyers are to provide a range of services beyond those currently offered, there will need to be changes made to the way the Scheme delivers its services. Providing enhanced services will require additional duty lawyer time. The findings in this thesis and the research show that there is demand and support for additional duty lawyer time. The implication of this thesis is that there is a need to revisit the way the duty lawyer service is implemented in Tasmania. The review of services is an internal Legal Aid Commission decision. It is suggested that the Commission be informed by this thesis in reviewing the duty lawyer service to determine whether it is possible to deliver enhanced services within current resource allocation. The researcher's dual roles of researcher and duty lawyer will enable her to make an evidence based contribution to inform a review.

One measure by which to assess whether initiatives are successful is to compare SRL attendance records with those of previous years. Another measure is to record the personal outcomes of SRLs, from their perspective and based on what they sought as an outcome. The record could report against a number of specific outcomes, with SRLs being asked:

- Did you receive the information and/or advice you wanted?

⁴⁰ Legal Aid Commission of Tasmania, *Annual Report 2014–2015* (2015), 29

⁴¹ Legal Aid Commission of Tasmania, *Annual Report 2013–2014* (2014).

- Did you understand the information and/or advice you received?
- Did the information and/or advice assist you in your decision making?
- Do you intend to act on the information and/or advice you received?
- Would you use the service again?
- What more could the service have done for you?

Most of these questions can be answered 'yes' or 'no'. The proportion of positive responses would be an indicator of success.⁴²

Collecting information about the personal outcomes of SRLs will ensure a focus on what matters to the people who use the duty lawyer services, and will identify what they need. The information recorded will identify the range of legal disputes and indicate what SRLs consider important. The data will assist the duty lawyers to reflect about the way they work. It may also assist in identifying any deficiencies in the service provided by the duty lawyers, to assist future planning by the LACT to achieve better outcomes for SLRs.

The duty lawyers currently record the number of SRLs assisted and the time for each matter, but are not asked to report on outcomes. In the future, both time and outcomes could be used to assess whether the resources allocated to the Scheme provide benefits commensurate with the costs. The duty lawyers already provide to LACT management a monthly statistical report tracking attendance. The current absence of outcome reporting means that there is no measurement of performance to link duty lawyer work with the Commission's strategic objectives, or to assess areas which need to be better targeted. There are currently no performance goals for duty lawyers and no recording of settlements or referrals to other agencies or, in general, of how effective the duty lawyers have been in the performance of their duties. This reporting will demonstrate to the Commission areas of need in the provision of services, but also better identify whether the duty lawyers are meeting their goals to confirm

⁴² A new Family Law Duty Lawyer form was published in 2016 to extend the fields to provide additional reporting data beyond that required by the Commonwealth. These data will be used by LACT to evaluate the duty lawyer performances as it provides data on level of client satisfaction and outcome according to whether the assistance provided was for a (short) procedural matter, involved negotiations and resulted in Interim or Final Orders.

that resources are well directed. The reporting will present empirical results for the Commission to draw on when considering how to optimise duty lawyer services.

Recommendation 2: Raising awareness of the Scheme and the services the duty lawyers provide

- That duty lawyers produce an updated version of the brochure which includes information about the services the duty lawyer can/cannot provide, hours of operation, information about who is eligible, and contact details for SRLs to make appointments;
- That duty lawyers provide input into an upgrading of LACT's internet services to add a new section as an entry point for information about the availability of duty lawyer services; and
- That the SRL section contain information on 'Representing Yourself in the Family Courts', including examples of simple orders, flow charts of the courts' processes and procedures, and how to prepare for trial.⁴³

It was always the intention that this research should raise awareness of the Scheme in Tasmania, and there has been some success in that.⁴⁴ However, the results revealed that there remains insufficient knowledge about the range of services a duty lawyer can provide, and confusion about the availability of the duty lawyer outside the confines of a duty list day.

(a) Brochure

The results from SRLs indicated that the majority had found out about the duty lawyer service from court staff, Legal Aid staff or by word of mouth.⁴⁵ It is a reasonable assumption that whoever referred SRLs may have provided them with a brochure on the service. The researcher was often asked for a brochure

⁴³ The researcher provided a copy of this chapter to the Director of the Legal Aid Commission of Tasmania, who wrote in an email to all staff in July 2016 announcing that LACT will develop an SRL entry point on the website home page to include information on representing yourself in the family courts.

⁴⁴ See Chapter IV: Part I: B.I.A: Tables 8 and 9 where SRLs said they would have used the duty lawyer service had they known about it.

⁴⁵ See Chapter IV: Part I: B.I.A: Table 7.

by people she addressed at presentations.⁴⁶ The majority of stakeholders considered that brochures at the court made SRLs aware of the service and raised awareness about the Scheme.⁴⁷ When this subject was first raised, the duty lawyers worked with the Community Legal Education Manager to produce a brochure.⁴⁸ This brochure was updated within existing duty lawyer time and without any additional resource implications. It is considered that the brochure developed in 2014 has assisted SRLs and others but it should be updated to reflect changes in the Scheme since then.

(b) Online Services

The LACT engaged in an Access to Justice Project which involved representatives from LACs around Australia working cooperatively to improve the community's awareness of Legal Aid services. The Commission was also re-designing its website to make it more workable, available in over 90 languages and with a literacy support function.⁴⁹

While the results from SRLs indicate that not one person found out about the duty lawyer from a website,⁵⁰ and the literature cautions against relying solely on providing information online,⁵¹ it is argued that there is scope for improving access to justice for SRLs through further improvements to the LACT homepage.⁵² Currently the homepage offers a number of navigation links to find the family law duty lawyer under the 'Going to Court?' box, suggesting that a person already knows what a duty lawyer does and that this is a service they need. A better approach would be to introduce a new section entitled 'Are you

⁴⁶ See Chapter IV: Part II: C: 3 (i) for Presentation to the Pathways Network and the National Council of Single Mothers and their Children.

⁴⁷ See Chapter IV: Part III: D: Table 26.

⁴⁸ See Chapter IV: Part II: C: 3 (i) for information on the brochure and website.

⁴⁹ Legal Aid Commission of Tasmania, *Annual Report 2014–2015* (2015) 12.

⁵⁰ See Chapter IV: Part I: B.I.A: Table 1.

⁵¹ Productivity Commission, above n 3, vol 1, 580–581, citing Julie Grainger, Submission 66.

⁵² Legal Aid Commission of Tasmania, *Annual Report 2014–2015* (2015). The report notes that there were 288,153 page views of the Legal Aid Website over the year. The population of Tasmania at 30 September 2015 was 517,183 persons (Australian Bureau of Statistics, Population, ABS Cat No 3101.0), which indicates a high level of access to the Legal Aid website,
<[https://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/Population.pdf/\\$file/Population.pdf](https://www.treasury.tas.gov.au/domino/dtf/dtf.nsf/LookupFiles/Population.pdf/$file/Population.pdf)>

representing yourself?’ as an entry point for information about duty lawyer services. This places the emphasis on the status of the person, and offers a single entry point to resources that may help them. The section contains information giving SRLs insight into the courts’ processes and ways they can cope with the stresses and complexities of court, as Canada’s website does.⁵³ This initiative represents a new and unique resource in the family law jurisdiction which could have national application.

Recommendation 3: Involving the duty lawyers in Community Legal Education

- That the duty lawyers participate in the LACT CLE program by developing information sessions with content appropriate to specific community groups and targeted to the needs of the audience.

One of the characteristics of SRLs in this study was that they are likely to rely on social security benefits and to have limited formal education and have difficulties in understanding the family law system.⁵⁴ This is particularly the case in Tasmania. Effective communication of legal assistance services was recommended by the Senate Legal and Constitutional Affairs References Committee in 2009.⁵⁵ Community Legal Education (‘CLE’) helps ensure that people are better informed about their legal options. The Productivity Commission identified that these services often ‘lack visibility’ which means they do not reach their target groups.⁵⁶ Allen Consulting identified CLE services as important preventative measures that ‘inform and build individual and

⁵³ See Devlin Farmer, *Representing Yourself in Court: How to Win Your Case on Your Own* (SelfCounsel Press Legal Series, 2016), at the National Self-Represented Litigants Project webpage, <<https://representingyourselfcanada.com/2016/05/19/new-self-help-book-g geared-towards-srls/>>; also see Hannah Bahmanpour and Julie Macfarlane, ‘Coping with the Courtroom: Essential Tips and Information for Self-Represented Litigants’, the National Self-Represented Litigants Project (2014), <<https://representingyourselfcanada.files.wordpress.com/2014/03/nsrlp-coping-with-the-courtroom-2014-07-2016-05.pdf>>.

⁵⁴ Rosemary Hunter, Jeff Giddings and April Chrzanowski, ‘Legal Aid and Self-Representation in the Family Court of Australia’ (Griffith University, May 2003); John Dewar, Barry Smith and Cate Banks, ‘Litigants in Person in the Family Court of Australia: Report to the Family Court of Australia’ (Research Report No 20, Family Court of Australia, 2000).

⁵⁵ Senate Legal and Constitutional Affairs References Committee (2004), above n 1 and (2009), above n 2.

⁵⁶ Productivity Commission, above n 3, Vol 1, 8.

community resilience'.⁵⁷ PricewaterhouseCoopers found that CLE sessions are a part of 'early intervention and prevention services that assist people to understand their legal rights and responsibilities.'⁵⁸

The LACT provides significant and targeted CLE information services throughout Tasmania.⁵⁹ The LACT has a program for future CLEs to extend both the range and scope of legal topics of interest to the community. Both the researcher and the Launceston duty lawyer already promote the Scheme to legal and non-legal assistance providers through CLE sessions;⁶⁰ these have been recognised as an efficient and cost-effective way of improving people's knowledge. LACT advertises the services on its homepage and asks people to make a booking for the required services which are free and tailored to suit the needs or interests of a particular group.⁶¹ The involvement of the duty lawyers in CLE sessions will require additional time. The extension of the duty lawyers' time has been previously discussed. If the duty lawyers are provided with additional time, it will enable them to develop and provide CLE information sessions by visiting specific community groups or running sessions at the court. The latter can be tailored to meet the need expressed by both SRLs and the judges that information be provided on the court's processes and procedures, particularly in relation to the conduct of hearings and trials. The LACT duty lawyers are experienced practitioners.⁶² This finding, coupled with feedback about the need to raise awareness of the Scheme, supports the benefits of duty lawyers providing education and information to the wider community. Presentations by the duty lawyers will need to be organised above their current work hours.

⁵⁷ Allen Consulting, above n 3, 46.

⁵⁸ PwC, *Economic Value of Legal Aid*, above n 3, iv.

⁵⁹ Legal Aid Commission of Tasmania, *Annual Report 2014–2015* (2015). The report notes that over the year, the Commission conducted 105 CLE sessions, reaching 5,144 people, 13.

⁶⁰ See Chapter IV: Part II: C: 3 (a) (i) for presentations made by the researcher.

⁶¹ Legal Aid Commission of Tasmania, *Community Legal Education sessions*, <<https://www.legalaid.tas.gov.au/videos/community-legal-education/>>.

⁶² Forell and Cain, above n 4. The EIU report said that duty lawyers need to have at least five years post admission experience to be fully operational and prepared for the rigours of the job.

Recommendation 4: Duty lawyer training

- That the duty lawyers assess the best way to deliver training in the provision of effective duty lawyer services for other legal aid practitioners in order to promote continued professional development and ensure future continuity of service.

The researcher and the Launceston duty lawyer have been in their current positions since the commencement of the Scheme in 2005. If the duty lawyer service is to continue to expand and make a contribution to the provision of efficient and effective services, consideration should be given to succession planning in order to ensure a capacity to adapt to future staffing changes.

One of the judges said that it would be worthwhile to use the experience of the current duty lawyers to identify training opportunities and develop programs which could be undertaken by new appointees to the role of duty lawyer.

The current duty lawyers have essential experience that allows them to deal with complex legal problems. They are therefore generally acknowledged to be able to offer and run presentations and training to ensure there are sufficient duty lawyers with relevant skills to deliver competent services. The duty lawyers' knowledge could be shared among other legal aid practitioners who want the diverse experience.

In addition to the recommendations above, a further set of operational recommendations were derived from the research project. These recommendations were presented to LACT management in 2016 and resulted in a number of changes to the day to day operations of the duty lawyer service. However, these recommendations are considered to be outside the scope of this thesis.

The recommendations presented in this thesis are based on practical realities which can be delivered within existing budgets, resources and structures. The adoption of the recommendations will provide a more accessible, integrated, coordinated and enhanced duty lawyer service. The recommendations in this Chapter are made in response to the data, the research, and innovative thinking

in legal practice which focuses on providing services for people involved in the family law system in flexible and cost-effective ways which make access to justice meaningful. If the LACT undertakes a review, the researcher is confident that it may find that an expanded and enhanced duty lawyer service will offer a broad range of assistance on a greater range of issues, and will be helpful to more people.

C Recommendations for future work

Changes to the Scheme are not without risks. Raising awareness about the Scheme may increase demand. With this in mind, it is recommended that any changes to work arrangements for the duty lawyers be evaluated after a 12 month period.

Proposals as to the basis and measures for evaluation are made as part of the recommendations. This evaluation could form the foundation of further research which may benefit from noting the limitations of the study instruments and developing shorter and clearer surveys. It is suggested that any follow-up with SRLs be by interviews that do not compromise ethical considerations for this vulnerable group. An evaluation after implementation of some or all of the recommendations will be a valuable guide to whether there are any different answers to the research questions raised in this thesis.

With the introduction of performance management of the duty lawyers based on goals, outcomes and accountability, an evaluation could assess whether the enhanced services are successful in providing assistance to a greater number of SRLs, and establish which services are soundly based.

Further research also would help flesh out some of the findings in this study where the questions to SRLs in the survey were unclear and responses were not elaborated upon. Information from SRLs could be more useful and relevant if it is obtained in interviews where SRLs can explain what they want, rather

than be limited to short-answer choices. Other resources⁶³ such as Toy-Cronin's research offer examples of how SRLs reveal details about their difficulties with the legal system if asked to tell their story.⁶⁴ In an economic climate where present and future funding arrangements in the legal assistance sector will continue to constrain the ability of SRLs to access legal aid,⁶⁵ this further research would mean that duty lawyer services could more closely target unmet legal needs.

It is hoped that the recommendations made in this thesis may also be of interest, and have application, to other LACs with similar problems and resource restrictions to those of Tasmania. Beyond this, one outcome of this study has been to raise the profile of duty lawyers and the work they do, and encourage other duty lawyers to identify innovations that may make a genuine difference to SRLs and all other participants in the family courts.

⁶³ The National Self-Represented Litigants Project webpage contains up-to-date resources on and for SRLs, <<https://representingyourselfcanada.com/>>; also see NSRLP blog, <<https://representingyourselfcanada.com/category/blog/>>, and Facebook page, <<https://www.facebook.com/NationalSelfRepresentedLitigantsProject/>>.

⁶⁴ Bridgette Toy-Cronin, *Keeping up Appearances*, above n 12, 85. Toy-Cronin says that case studies and interviews allowed her to obtain rich information on Litigants in Persons' expectations, perceptions and misperceptions of the court system, which gave her a 'greater understanding of the interaction between LiPs and the "system"'.

⁶⁵ Penny Timms, 'Legal Aid Matters: Lack of Government Funding "Destroying Lives", Law Council Says' *ABC News* (online) 16 May 2016. <<http://www.abc.net.au/news/2016-05-16/law-council-of-australia-launches-legal-aid-matters-campaign/7417094>>. The article quoted sources complaining about the chronic underfunding in Legal Aid, despite the recommendations of the Productivity Commission that funding be increased by \$200 million. Law Council of Australia President Stuart Clark said, 'the simple fact is that not funding legal aid is actually not economically sensible ... Every time a person goes to court without legal representation, they're at a real disadvantage. It could be in the family court ... We know the fact people are going to court unrepresented is an absolute tragedy. It is, quite simply, destroying lives'.

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Appendices

Appendix A

Document Pack – Survey of Self-Represented Litigants, Information Sheet and Survey Questions for Self-Represented Litigants and Guidelines for Legal Practitioners Conducting the Survey



PARTICIPANT INFORMATION SHEET: SELF-REPRESENTED LITIGANTS

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

Invitation

This Information Sheet invites you to participate in a survey to assist research for a PhD thesis which investigates the impact on self-represented litigants (SRLs) of the Family Law Duty Lawyer Scheme where the Legal Aid Commission provides the services of a duty lawyer, free of charge, to people who have matters in either the Family Court or the Federal Circuit Court.

If you would like to participate in the survey, could you please read the Information Sheet provided which gives you more details about the research project, your participation in it and the security measures which are in place to protect your identity and the information, and confirms to the researcher that you have agreed to complete this survey?

Please note that your involvement in this survey is voluntary and that completion of the survey will constitute consent by you. There are no consequences if you do not participate.

This survey is being conducted on behalf of the researcher, who is a full-time PhD student in the Faculty of Law, University of Tasmania but is also working part-time as the Family Law Duty Lawyer with the Legal Aid Commission of Tasmania. Your information will not be held or used by the Legal Aid Commission.

What is the purpose of this study?

The study aims to increase awareness of the duty lawyer service and look at all aspects of how a duty lawyer can help people involved in the family law system and, if appropriate, make recommendations on how to improve the delivery of the duty lawyer service.

What will you be asked to do?

You should read the questions on the survey and record your answers. You do not have to finish the survey if you do not want to. You can leave the room at any time. However, we ask that you put the survey in the envelope which has been provided and seal it. When you leave, please give the envelope either to the legal practitioner or the coordinator who will collect the envelopes and arrange for their safe storage until the researcher collects the information.

Why have you been invited to participate?

As a self-represented litigant, the researcher considers your views and comments would provide an invaluable first-hand source of information for the study.

Are there any possible benefits from participation in this study?

Although this thesis will not be published until 2016, the researcher anticipates that there may be immediate benefits to the participants by making people aware of, or reminding them about, the advantages of using the family law duty lawyer. If you have ongoing matters in court and have not previously known about or used the duty lawyer service, you may consider doing so in the future. It is anticipated that the results from the interviews and surveys may enhance the efficiency and effectiveness of courts dealing with people who appear self-represented in family law matters.

Are there any possible risks from participation in this study?

The researcher does not consider that there are any risks to you from your participation in this study and appreciates you taking the time to do the survey. Should you decide you no longer wish to participate in the survey, you may leave any time you wish, without needing to give an explanation.

However, you should know that any information you may have provided will be used in the study, but in any case, please be assured that your contribution is anonymous. Your identity cannot be determined through your participation or responses. Participants will not be identifiable in the publication of the results.

If any question in the survey, or the process itself, makes you feel uncomfortable, distressed or anxious, please ask the legal practitioner or the coordinator for the contact details of a counselling service such as Positive Solutions, Relationships Australia, Anglicare or Centacare, or any other service of your choice.

What will happen to the information when this study is over?

The completed survey in their envelopes will be provided to the researcher who will record the information with a security code on a University of Tasmania secure server. All information is anonymous with no link to the identity of the participants. The information needs to be kept for 5 years after publication of the thesis, after which time, the information will be destroyed.

Please also note that this study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on (03) 6226 7479 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H13028.

Should you have any queries in relation to this research, please do not hesitate to contact me or my Primary Supervisor, Professor George Zdenkowski. Our contact details are as follows:

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You may wish to retain this Information Sheet for your records.

* At the time of sending out these document packs, Professor George Zdenkowski was the researcher's Primary Supervisor. Dr Rundle became the Primary Supervisor on 25 February 2013.

SURVEY QUESTIONS FOR SELF-REPRESENTED LITIGANTS (Please circle one or more, as applicable).

DATE.....DAY OF.....2013

Gender of SRL:

- (a) Male
- (b) Female

1. Which court services did you access or attend?
 - (a) Family Court
 - (b) Federal Circuit Court (formerly Federal Magistrates Court)
 - (c) I have not accessed or attended court
 - (d) Family Court website
 - (e) Other. Please specify
2. What type of dispute did you have?
 - (a) Children
 - (b) Children and Property
 - (c) Property
 - (d) Child support
 - (e) Contravention
 - (f) Divorce
 - (g) Other. Please specify
3. If you attended court or accessed the courts services, did you know that there was a Duty Lawyer available to help you?
 - (a) Yes
 - (b) No
4. Were you offered the assistance of a Duty Lawyer?
 - (a) Yes
 - (b) No
5. Did you receive the assistance of a Duty Lawyer?
 - (a) Yes – if 'Yes' please go to Section 'A'
 - (b) No – if 'No' please go to Section 'B'

SECTION 'A' – IF YOU DID GET THE HELP OF A DUTY LAWYER

6. How did you find out about the Duty Lawyer?
 - (a) Court staff
 - (b) Judge of the Family Court
 - (c) Judge of the Federal Circuit Court (formerly Federal Magistrates Court)
 - (d) Lawyer for the other party
 - (e) Legal aid staff or lawyer
 - (f) Publication/website
 - (g) Other. Please specify
7. What did the Duty Lawyer help you with?
 - (a) Filling out the documents
 - (b) Appearing in court for you
 - (c) Getting an understanding of the system
 - (d) Assisting in negotiations with the other party's lawyer
 - (e) Attending mediation with you
 - (f) After the court event to explain what went on or what you had to do
 - (g) Other. Please specify

8. Did having the Duty Lawyer's help mean that your case proceeded more quickly through the court?
 - (a) Yes
 - (b) No
 - (c) Don't know
9. Did the Duty Lawyer help you to achieve a satisfactory outcome in the circumstances of your case?
 - (a) Yes
 - (b) No
 - (c) Don't know
10. Did you feel rushed or pushed towards settlement?
 - (a) Yes
 - (b) No
 - (c) No opinion
11. If 'YES', to Question 13, by whom?
 - (a) The Duty Lawyer
 - (b) The Judge of the Family Court
 - (c) The Judge of the Federal Circuit Court (formerly Federal Magistrates Court)
 - (d) The Registrar
 - (e) The Family Consultant
 - (f) The lawyer for the other party
 - (g) The other party
12. If the Duty Lawyer's advice was that your matter was not likely to be successful, would you
 - (a) Accept the advice and discontinue the proceedings
 - (b) Accept the advice and attend mediation instead
 - (c) Reject the advice and proceed regardless
 - (d) Other. Please specify
13. How did you feel about the Family Court system after having received the help of the Duty Lawyer?
 - (a) Better
 - (b) Worse
 - (c) No different
14. Could the Duty Lawyer have done anything more to improve the service to you?
 - (a) Yes – Please provide details of what the Duty Lawyer could have done
 - (b) No
 - (c) Don't know

SECTION 'B' – IF YOU DID NOT GET THE HELP OF A DUTY LAWYER

15. If you had known about the Duty Lawyer Service, would you have used it?
 - (a) Yes – If 'Yes', please answer questions 21 to 25
 - (b) No—if 'No', please only answer questions 20 and 25
16. If 'No' to question 19, why?
 - (a) I distrust lawyers
 - (b) I know my case best
 - (c) I want to speak to the judicial officer directly
 - (d) I have accessed the court and legal websites/advice lines and think I can conduct my own case
 - (e) The court may be more responsive to a self-represented litigant
 - (f) It would not have made any difference to the outcome

- (g) To drag things on so the other person spends more money or is forced to settle
 - (h) Other. Please specify
17. What do you think the Duty Lawyer could have helped you with?
- (a) Filling out the documents
 - (b) Appearing in court for you
 - (c) To get an understanding of the system
 - (d) To assist in negotiations with the other party's lawyer
 - (e) To attend mediation with you
 - (f) Other. Please specify
18. At what stage of the proceedings do you think you would have benefited most from getting the help of the Duty Lawyer?
- (a) Before the court event – as early as possible
 - (b) During the court event – to appear for you
 - (c) After the court event – to explain the outcome
19. How did representing yourself affect your case?
- (a) Disadvantaged me
 - (b) Improved my position
 - (c) No difference
-]
20. Do you think it would have made any difference to the outcome of your case if you had had the help of a Duty Lawyer?
- (a) Yes – please provide details
 - (b) No – please provide details
 - (c) Don't know
21. In your opinion, how can the Family Law Duty Lawyer Scheme be improved for SRLs, the Duty Lawyer, Court Staff and Personnel or the Courts?

THANK YOU FOR COMPLETING THIS SURVEY

GUIDELINES FOR LEGAL PRACTITIONERS CONDUCTING CLINIC ADVICE SESSIONS AND SURVEY OF SELF-REPRESENTED LITIGANTS IN FAMILY LAW DISPUTES

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

This survey of self-represented litigants (SRLs) forms part of the study for a PhD thesis which investigates the impact of the Family Law Duty Lawyer Scheme on people progressing through either the Family Court of Australia or the Federal Circuit Court of Australia on an unrepresented basis at any time during proceedings.

This survey involving self-represented litigants (SRLs) is being conducted through clinic advice sessions in Tasmania over a period of six weeks. The survey should only take the SRL approximately 10 minutes to complete.

It has proved extremely difficult for researchers to obtain information from SRLs on their interaction with the Family Court system. I have chosen the opportunity provided by the clinic advice sessions to capture information from SRLs who attend the sessions in the hope that the fact they have attended the sessions voluntarily may encourage them to participate in a survey which is designed to elicit information which may ultimately, improve services to SRLs.

As a legal practitioner who conducts clinic sessions, you are asked to assist the researcher by obtaining the opinion of SRLs, specifically on any interaction they have had with the Family Law Duty Lawyer during the course of their proceedings in either the Family Court of Australia or the Federal Circuit Court of Australia.

The purpose of asking the person to participate **at the conclusion of the session** is to avoid any impression of advantage or disadvantage if they do not wish to participate.

All participants should be treated the same way.

The following information is provided as Guidelines for the conduct of the survey:

AT THE CONCLUSION OF THE CLINIC SESSION – Please note that participation in this survey is only for persons who are over 18 years of age and can give informed consent:

1. If the session involves a family law matter, please ask the person if they have either appeared or may appear unrepresented at any stage of family court proceedings;
2. If 'Yes', please ask them if they would like to participate in a survey. If they agree, please thank the person, in advance, for their time and courtesy in agreeing to do the survey. If they do not agree, please end the clinic session as you normally would'.
3. Please explain to the person that their participation is voluntary. There are no consequences if they do not participate. However, if they agree to participate, you can give them the **Information Sheet and the survey questions**. Please explain that by

completing the survey, they are providing their consent. Upon completion of the survey, either you or they are to put it in the envelope labelled 'Survey' and seal it;

4. Please say that you will be leaving the room to allow them to read the documents and complete the survey. However, if they would like you to help them with any part of the process, you would be happy to do so, Please say that they are welcome to retain the Information Sheet, if they wish;
5. Please explain to the person that, at any stage, if they decide they no longer wish to participate in the survey, they can leave the session. They do not need to provide an explanation. Please explain to the person that if any of the questions cause them to experience distress or anxiety, there are counselling facilities available through any of the counselling services, such as Positive Solutions, Relationships Australia, Centacare, Angicare, or any other service of their choice and provide contact details;
6. In the event that either you feel uncomfortable or the person becomes angry, distressed or otherwise emotionally affected while you are explaining the survey, please terminate the session. Thank the person for their time;
7. When the person has completed the survey, please collect the sealed envelope (or, if it is not sealed, seal it) and ensure that the envelope is given to the co-ordinator of the advice sessions who will put the envelope containing all completed surveys for the clinic sessions in a designated spot where the co-ordinator can find it the next day. At the end of each week, the co-ordinator will put into an envelope addressed to the researcher all the completed surveys. The envelope should be either left at or mailed to the offices of the Legal Aid Commission of Tasmania, 158 Liverpool Street, Hobart, TAS, 7000 or through DX123.

I appreciate you taking the time to co-operate with this study and wish to thank you in anticipation of your commitment.

Should you have any questions about this study, please do not hesitate to contact me or my Primary Supervisor, Professor George Zdenkowski. Our contact details are provided below.

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Appendix B

Document Pack – Judicial Officers

Letter of Invitation, Information Sheet, Consent Form and Questions for Judicial Officers



LETTER OF INVITATION: FAMILY COURT OF AUSTRALIA, FEDERAL CIRCUIT COURT OF AUSTRALIA

Dear Judge

Request for Interview for PhD Study: Self-Represented Litigants: Impact of the Family Law Duty Lawyer Scheme in Tasmania.

I am a Family Court Duty Lawyer working for the Legal Aid Commission of Tasmania. I am also a current full-time PhD candidate at the University of Tasmania. My thesis seeks to investigate the impact of the Family Court Duty Lawyer Scheme (the 'Scheme') since its introduction in March 2005.

This thesis will extend the research conducted previously by examining the impact of the Scheme on self-represented litigants (SRLs) from the perspective of other key participants in the family court system such as the judiciary, court staff who deal with SRLs, duty lawyers who appear for SRLs and family law practitioners who represent clients who have had to deal with SRLs on the other side. I will also survey SRLs to hear their views on their interaction with the family court system.

I am writing to enquire whether you would be willing to be **interviewed** and provide your personal views and experiences on the issue of SRLs, with particular emphasis on any observations which can be made in relation to occasions when a duty lawyer would have been of assistance or actually was of assistance.

It is an important component of this thesis that the widest possible range of people who have contact with self-represented litigants present their views and, importantly, that self-represented litigants themselves have an opportunity to comment on their experience with the family courts. The data I collect will provide a detailed and original information base which will greatly enrich the analysis of the key issues addressed in the thesis.

My thesis also very much depends upon hearing the views, opinions and any concerns of judicial officers who are specifically involved with and affected by people representing themselves in the family courts and learning what benefits may flow to all participants in the legal system from the intervention of the duty lawyer. This will be a qualitative study to ascertain majority viewpoints.

Your responses, and the responses of the other interviewees, will be included in my thesis. I may also refer to your responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

I request that you consider that the interview be held in your chambers. I estimate that it will take approximately 30mins. To assist you in considering my request favourably, **I am enclosing a Consent Form and an Information Sheet** which outlines in full the aims, scope and methodology to be used in the thesis, as well as the security arrangements in relation to all information which I collect. Also **enclosed is a sheet containing the questions I will be asking**. Please note that there will be an opportunity for you to provide comment at the end of the questionnaire.

This study has received ethical approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health & Medical Research Council. Any concerns of an ethical nature or complaints about the manner in which the study is conducted may be directed to the Ethics Executive Officer at human.ethics@utas.edu.au or telephone (03) 6226 7479. Please quote Reference Number H13028.

The study has also been approved by the Ethics and Research Committee of the Family Court of Australia and the Federal Circuit Court of Australia.

If you agree to participate in this study, please complete and sign the Consent Form and return it to me by email to the below address. The Consent Form is a requirement of the University's Ethics Committee. Once I have received the Consent Form, I will contact your Associate by email to arrange an interview time, at your convenience.

Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Professor George Zdenkowski. Our contact details are provided below.

I very much hope you will be able to assist with my research.

I look forward to hearing from you.

Yours sincerely,

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PARTICIPANT INFORMATION SHEET: JUDICIAL OFFICERS OF THE FAMILY COURT OF AUSTRALIA AND THE FEDERAL CIRCUIT COURT OF AUSTRALIA

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

Invitation

I am writing to you to invite you to participate in an **interview** to assist in research which seeks to investigate the impact on self-represented litigants (SRLs) appearing in the Family Court of Australia and the Federal Circuit Court of Australia of the Family Law Duty Lawyer Scheme (the 'Scheme') whereby a duty lawyer was to be available in every court dealing with family matters to assist SRLs on the day of their court event.

I am a full-time PhD student in the Faculty of Law, University of Tasmania under the supervision of Professor George Zdenkowski and Dr Olivia Rundle. I am also working part-time as the Family Law Duty Lawyer with the Legal Aid Commission of Tasmania.

This will be an original study and provide important insights into the operation of the Scheme since its commencement in 2005 and how the family law system may benefit as a result of any reforms which may be recommended in this study.

What is the purpose of this study?

The study aims to increase awareness of the duty lawyer service and look at all aspects of how a duty lawyer can help people involved in the family law system and, if appropriate, make recommendations on how to improve the delivery of the duty lawyer service.

The key aims of this study are:

- To assess how the Family Law Duty Lawyer Scheme provides access to justice for self-represented litigants;
- To identify the purpose and nature of the duty lawyer role from the perspective of the key participants;
- To explore the impact of the Scheme on self-represented litigants and other key participants in the family law system;
- To identify appropriate reforms for the Scheme to better deliver the duty lawyer service.

What is the scope of this study?

This will be a quantitative and qualitative study as follows:

- A survey of self-represented litigants will be conducted by legal practitioners of the Legal Aid Commission of Tasmania and the Hobart Community Legal Service during the clinic legal advice sessions;
- Interviews will be conducted with judicial officers of the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC) in Tasmania;

- Interviews will be conducted with the duty lawyers working with the Legal Aid Commission of Tasmania;
- An online survey will be sent out to court staff of the combined registry of the FCA and FCC in Hobart and Launceston and all legal practitioners who are members of the Family Law Practitioners' Association of Tasmania;

Following analysis of the data from this study, recommendations may be made in relation to improving the delivery of the duty lawyer service.

Why have I been invited to participate?

Given the high number of people representing themselves in the family courts, I consider that your views and comments based on your experiences with SRLs would provide an invaluable source of information for the study. Your responses, and the responses of the other interviewees, will be included in my thesis. I may also refer to your anonymised responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

Please note that your involvement in this interview is voluntary. There are no consequences if you do not participate.

What will I be asked to do?

You have been provided with a **Consent Form which I request that you sign and return to me by scan** to my email address provided below. The Consent Form is a requirement of the University's Ethics Committee.

I anticipate that the interview will be conducted in private, in your chambers, or other place nominated by you. I estimate that the interview will take approximately 30 minutes. The interview will be audio recorded by iPhone and later transcribed.

As I hope to interview all the judicial officers of both courts in the selected jurisdictions over two consecutive days, I will contact your Associate closer to the time to organise a time and date suitable to you.

You may decline to answer any question and withdraw from the study at any time, without any explanation. However, please note that any information you may have provided can be used in the study as your identity and responses remain anonymous.

Should you agree to participate in the study, no-one except myself and my supervisors will be aware you were interviewed. Your responses will be linked with your name through a code, known only by me.

Following receipt of your signed Consent Form, you will receive by email, five questions on notice which

I intend to ask at interview, together with an open question at the end as to 'any other comments'.

The interview is being requested of you in your professional capacity at your respective court. **You are asked to respond to the request within fourteen (14) days.** In the event that no response has been received by that time, a reminder email will be sent through the court's internal email, allowing a further seven (7) days for a response. **Should you not wish to participate in the interview, I would be most grateful if you could indicate accordingly by sending an email to me at the below listed address.**

Are there any possible benefits from participation in this study?

Benefits to Participants:

- to be part of an original study which obtains the views of key and significant participants in the family law system;

- to be able to freely and honestly express those views about the issues confronted by, and the impact of, SRLs in the family courts;
- to comment on the difference to the process and/or the outcome of a matter involving SRLs when a duty lawyer is involved; and
- to have those views put forward anonymously but with sufficient coverage of the key participants to be able to assure the participants that their contribution will form the basis for the first major study on this topic.

Benefits to the Wider Community:

- to present the views of the key participants in the family law system which identify the issues, concerns and difficulties when an SRL is involved in the legal process and to identify where, when and how the duty lawyer may be able to interact with the legal system and SRLs to ensure a better outcome for all involved;
- to identify possible areas of reform to the Family Law Duty Lawyer Scheme to better meet the needs of the family law system; and
- to promote the use of the Family Law Duty Lawyer Scheme by encouraging greater interaction between the judiciary, court staff and personnel, legal practitioners and SRLs with the duty lawyer.

It is anticipated that the results from the interviews and surveys may enhance the efficiency and effectiveness of courts dealing with people who appear self-represented in family law matters.

Are there any possible risks from participation in this study?

I do not consider that there are any possible risks to you from your participation in this study, apart from the inconvenience of you devoting time to the interview.

Please be assured that your contribution is anonymous. Your identity cannot be determined through your participation or responses. The only identifying characteristic to be published is the fact that you are a current sitting judicial officer of a family court.

What will happen to the information when this study is over?

The interviews will be recorded by iPhone. Each interview will be downloaded onto my password protected University server and transcribed. Transcription of interviews is necessary to provide a copy to the interviewee for their approval or amendment and to allow me to conduct appropriate analysis. It is also necessary to retain a hard copy as it will be a valuable record to ensure accuracy. Each interviewee will be provided with a transcript of their individual interview which will be sent out by email and will be given an opportunity to amend before any information contained in the transcript is published.

Data (transcripts of interviews) will be security coded and stored on a University secure server and protected by a private password in a locked room. The information will also be stored on a secure university server. The information will also be stored on a USB and hard copies made and both will be stored in separate folders in a locked filing cabinet in a locked room. Interviewees will not be identifiable by the recording or written transcript of their interview. Interviewees will be identifiable by a code, known only by me. Data will be kept for the required five years after publication, after which time they will be destroyed

How will the results of the study be published?

The results will be published as part of a PhD thesis by March 2017. Participants will not be identifiable in the publication of the results.

Please also note that this study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on (03) 6226 7479 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H13028.

The study has also been approved by the Ethics and Research Committee of the Family Court of Australia and the Research and Ethics Sub-Committee of the Federal Circuit Court of Australia.

Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Honorary Professor George Zdenkowski. Our contact details are provided below.

Kiki Mussared
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Professor George Zdenkowski
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You may wish to retain this Information Sheet for your records.

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<p>Faculty of Law</p>



PARTICIPANT CONSENT FORM

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN AUSTRALIA

INTERVIEW: JUDGE OF THE FAMILY COURT OF AUSTRALIA & FEDERAL CIRCUIT COURT OF AUSTRALIA

1. I agree to take part in the research study named above.
2. I have read and understood the Information Sheet for this study.
3. The nature and possible effects of the study have been explained to me.
4. I understand that the study involves an interview where I will give my views and opinions on the impact the intervention of the duty lawyer has had on the different participants in the family law system and whether there was any benefit to those participants. I understand the interview will be recorded by iPod and that I will be able to review a copy of the transcript and make any amendments prior to publication on or about March 2017.
5. The interview will take place in my chambers at a time scheduled by me and at my convenience. There are no foreseeable risks involved in this process.
6. I understand that all research data will be securely stored on the researcher's password protected University server and that all copies of signed Consent Forms and transcripts will be kept separately, in a locked filing cabinet in the researcher's room at the university. The recorded interviews and transcripts will be retained for five years following the submission of the researcher's thesis and will then be destroyed.
7. Any questions that I have asked have been answered to my satisfaction.
8. I understand that the researcher will maintain confidentiality and that any information I supply to the researcher will be used only for the purposes of the research.
9. I understand that the results of the study will be published and that I cannot be identified as a participant.
10. I understand that my participation is voluntary and that I may withdraw at any time without any effect.

Participant's name: _____
 Participant's signature: _____
 Date: _____

Statement by Investigator

The participant has received the Information Sheet where my details have been provided so the participant has had the opportunity to contact me prior to consenting to participate in this project.

Investigator's name: _____
 Investigator's signature: _____
 Date: _____

INTERVIEW QUESTIONS FOR THE JUDICIARY

DATE.....DAY OF.....

1. At what stage of the proceedings do you think the Duty Lawyer should become involved and would be more effective?
2. In your opinion, are litigants more likely to be disadvantaged if they appear unrepresented?
 - (a) Yes
 - (b) No(If 'Yes' please explain why)
3. What has been the impact of an SRL appearing before you?
 - (a) On you
 - (b) On court staff
 - (c) On the court system
 - (d) On the lawyers appearing for the other party
 - (e) On the SRL themselves(Please provide references to specific cases as appropriate to illustrate particular features that arose from having an SRL appear)
4. From your experience as a judicial officer, what practical difference (whether positive or negative) has the intervention of the duty lawyer made to the efficient running of the court system? Please indicate the most significant areas, including:
 - (a) Matters take less time
 - (b) Alleviates the stress on court staff and personnel
 - (c) Alleviates the stress on judiciary
 - (d) Alleviates the stress on the lawyer for the other party
 - (e) Alleviates the stress on the Independent Children's Lawyer
 - (f) Alleviates the stress on the SRL
 - (g) Provides more opportunities for negotiation
 - (h) Matters are more likely to settle
 - (i) The SRL feels they have lost control of the presentation of their case
 - (j) Made no difference at all
5. What do you see as the primary purpose and nature of the duty lawyer role?
6. What benefits do you think the duty lawyer service provides to SRLs?
7. In your opinion, what interventions by a duty lawyer would be of most benefit to:
 - (a) SRLs
 - (b) Court system
8. In your opinion, to which proceedings should the duty lawyer give priority and why?
 - (a) Children's matters
 - (b) Property matters
 - (c) Matters involving family violence
 - (d) Any urgent Interim application/Response
- 9.. In your opinion, how can the Family Law Duty Lawyer Scheme be improved?

Appendix C

Document Pack – Duty Lawyers

Letter of Invitation to Family Law Duty Lawyers for Interview, Information Sheet, Consent Form and Questions



LETTER OF INVITATION: FAMILY LAW DUTY LAWYER - LEGAL AID COMMISSION OF TASMANIA

Dear Colleague

Request for Interview for PhD Study: Self-Represented Litigants: Impact of the Family Law Duty Lawyer Scheme in Tasmania.

I am a Family Court Duty Lawyer working for the Legal Aid Commission of Tasmania. I am also a current full-time PhD candidate at the University of Tasmania. My thesis seeks to investigate the impact of the Family Court Duty Lawyer Scheme (the 'Scheme') since its introduction in March 2005.

This thesis will extend the research conducted previously by examining the impact of the Scheme on self-represented litigants (SRLs) from the perspective of other key participants in the Family Court system such as the judiciary, court staff and personnel who deal with SRLs, Duty Lawyers who appear for SRLs and family law practitioners who represent clients who have had to deal with SRLs on the other side. I will also survey SRLs to hear their views on their interaction with the Family Court system.

I am writing to enquire whether you would be willing to be **interviewed** and provide your personal views and experiences on the issue of SRLs, with particular emphasis on any observations which can be made in relation to occasions when a duty lawyer would have been of assistance or actually was of assistance.

Your responses, and the responses of the other interviewees, will be included in my thesis. I may also refer to your responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

I request that you consider that the interview be held at the offices of Legal Aid. I estimate that it will take approximately 30mins. To assist you in considering my request favourably, I am enclosing an **Information Sheet** which outlines in full the aims, scope and methodology to be used in the thesis, as well as the security arrangements in relation to all information which I collect, together with a **Consent Form and a sheet containing the five questions I will be asking**. Please note that there will be an opportunity for you to provide comment at the end of the questionnaire.

This study has received ethical approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health & Medical Research Council. Any concerns of an ethical nature or complaints about the manner in which the study is

conducted may be directed to the Ethics Executive Officer at human.ethics@utas.edu.au or telephone (03) 6226 7479. Please quote Reference Number H13028.

The study has also been approved by the Ethics and Research Committees of the Family Court of Australia and the Research and Ethics Sub-Committee of the Federal Circuit Court of Australia.

If you agree to participate in this study, please complete and sign the Consent Form and return it to me by email to the address provided below. The Consent Form is a requirement of the Ethics Committee. Once I have received the Consent Form, I will contact you by email to arrange an interview time, at your convenience.

It is an important component of this thesis that the widest possible range of people who have contact with self-represented litigants present their views and, importantly, that self-represented litigants themselves have an opportunity to comment on their experience with the Family Courts. The data from the interviews and the surveys will provide a detailed and original information base which will greatly enrich the analysis of the key issues addressed in the thesis.

My thesis also very much depends upon hearing the views, opinions and any concerns of the Duty Lawyers who specifically deal with people representing themselves in the Family Courts and what benefits may flow to all participants in the legal system from the intervention of the family law Duty Lawyer. This will be a quantitative study to ascertain majority viewpoints.

Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Professor George Zdenkowski. Our contact details are provided below.

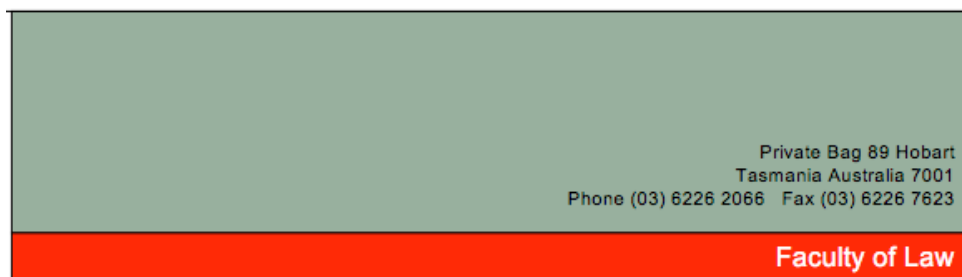
I very much hope you will be able to assist with my research.

I look forward to hearing from you.

Yours sincerely,

Kiki Mussared
BA (Hons) LLB (Hons) GradCertLegalPrac
PhD Candidate
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University of Tasmania
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PARTICIPANT INFORMATION SHEET: FAMILY LAW DUTY LAWYER – LEGAL AID COMMISSION OF TASMANIA

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

Invitation

I am writing to you to invite you to participate in an **interview** to assist in research which seeks to investigate the impact on self-represented litigants (SRLs) appearing in the Family Court of Australia and the Federal Circuit Court of Australia of the Family Law Duty Lawyer Scheme (the 'Scheme') whereby a duty lawyer was to be available in every court dealing with family matters to assist SRLs on the day of their court event.

I am a full-time PhD student in the Faculty of Law, University of Tasmania under the supervision of Honorary Professor George Zdenkowski and Dr Olivia Rundle. I am also working part-time as the Family Law Duty Lawyer with the Legal Aid Commission of Tasmania.

This will be an original study and provide important insights into the operation of the Scheme since its commencement in 2005 and how the family law system may benefit as a result of any reforms which may be recommended in this study.

What is the purpose of this study?

The study aims to increase awareness of the duty lawyer service and look at all aspects of how a duty lawyer can help people involved in the family law system and, if appropriate, make recommendations on how to improve the delivery of the duty lawyer service.

The key aims of this study are:

- To assess how the Family Law Duty Lawyer Scheme provides access to justice for self-represented litigants;
- To identify the purpose and nature of the duty lawyer role from the perspective of the key participants;
- To explore the impact of the Scheme on self-represented litigants and other key participants in the family law system;
- To identify appropriate reforms for the Scheme to better deliver the duty lawyer service.

What is the scope of this study?

This will be a quantitative and qualitative study as follows:

- A survey of self-represented litigants will be conducted by legal practitioners of the Legal Aid Commission of Tasmania and the Hobart Community Legal Service during the clinic legal advice sessions;
- Interviews will be conducted with judicial officers of the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC) in Tasmania;
- Interviews will be conducted with the duty lawyers working with the Legal Aid Commission of Tasmania;

- An online survey will be sent out to court staff of the combined registry of the FCA and FCC in Hobart and Launceston and all legal practitioners who are members of the Family Law Practitioners' Association of Tasmania;

Following analysis of the data from this study, recommendations may be made in relation to improving the delivery of the duty lawyer service.

Why have I been invited to participate?

Given the high number of people representing themselves in the family courts, I consider that your views and comments based on your experiences with SRLs would provide an invaluable source of information for the study. Your responses, and the responses of the other interviewees, will be included in my thesis. I may also refer to your anonymised responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

Please note that your involvement in this interview is voluntary. There are no consequences if you do not participate.

What will I be asked to do?

You have been provided with a **Consent Form which I request that you sign and return to me by scan** to my email address provided below. The Consent Form is a requirement of the University's Ethics Committee.

I anticipate that the interview will be conducted in private, in your office, or other place nominated by you. I estimate that the interview will take approximately 30 minutes. The interview will be audio recorded by iPhone and later transcribed.

As I hope to interview all the judicial officers of both courts in the selected jurisdictions over two consecutive days, I will contact your Associate closer to the time to organise a time and date suitable to you.

You may decline to answer any question and withdraw from the study at any time, without any explanation. However, please note that any information you may have provided can be used in the study as your identity and responses remain anonymous.

Should you agree to participate in the study, no-one except myself and my supervisors will be aware you were interviewed. Your responses will be linked with your name through a code, known only by me.

Following receipt of your signed Consent Form, you will receive by email, five questions on notice which I intend to ask at interview, together with an open question at the end as to 'any other comments'.

The interview is being requested of you in your professional capacity at your respective court. **You are asked to respond to the request within fourteen (14) days.** In the event that no response has been received by that time, a reminder email will be sent through the court's internal email, allowing a further seven (7) days for a response. **Should you not wish to participate in the interview, I would be most grateful if you could indicate accordingly by sending an email to me at the below listed address.**

Are there any possible benefits from participation in this study?

Benefits to Participants:

- to be part of an original study which obtains the views of key and significant participants in the family law system;
- to be able to freely and honestly express those views about the issues confronted by, and the impact of, SRLs in the family courts;

- to comment on the difference to the process and/or the outcome of a matter involving SRLs when a duty lawyer is involved; and
- to have those views put forward anonymously but with sufficient coverage of the key participants to be able to assure the participants that their contribution will form the basis for the first major study on this topic.

Benefits to the Wider Community:

- to present the views of the key participants in the family law system which identify the issues, concerns and difficulties when an SRL is involved in the legal process and to identify where, when and how the duty lawyer may be able to interact with the legal system and SRLs to ensure a better outcome for all involved;
- to identify possible areas of reform to the Family Law Duty Lawyer Scheme to better meet the needs of the family law system; and
- to promote the use of the Family Law Duty Lawyer Scheme by encouraging greater interaction between the judiciary, court staff and personnel, legal practitioners and SRLs with the duty lawyer.

It is anticipated that the results from the interviews and surveys may enhance the efficiency and effectiveness of courts dealing with people who appear self-represented in family law matters.

Are there any possible risks from participation in this study?

I do not consider that there are any possible risks to you from your participation in this study, apart from the inconvenience of you devoting time to the interview.

Please be assured that your contribution is anonymous. Your identity cannot be determined through your participation or responses. The only identifying characteristic to be published is the fact that you are a current duty lawyer employed by the Legal Aid Commission of Tasmania.

What will happen to the information when this study is over?

The interviews will be recorded by iPhone. Each interview will be downloaded onto my password protected University server and transcribed. Transcription of interviews is necessary to provide a copy to the interviewee for their approval or amendment and to allow me to conduct appropriate analysis. It is also necessary to retain a hard copy as it will be a valuable record to ensure accuracy. Each interviewee will be provided with a transcript of their individual interview which will be sent out by email and will be given an opportunity to amend before any information contained in the transcript is published.

Data (transcripts of interviews) will be security coded and stored on a University secure server and protected by a private password in a locked room. The information will also be stored on a secure university server. The information will also be stored on a USB and hard copies made and both will be stored in separate folders in a locked filing cabinet in a locked room. Interviewees will not be identifiable by the recording or written transcript of their interview. Interviewees will be identifiable by a code, known only by me. Data will be kept for the required five years after publication, after which time they will be destroyed

How will the results of the study be published?

The results will be published as part of a PhD thesis by March 2017. Participants will not be identifiable in the publication of the results.

Please also note that this study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on (03) 6226 7479 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H13028.

The study has also been approved by the Ethics and Research Committee of the Family Court of Australia and the Research and Ethics Sub-Committee of the Federal Circuit Court of Australia.

Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Honorary Professor George Zdenkowski. Our contact details are provided below.

I look forward to hearing from you.

Yours sincerely

Kiki Mussared
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Kiki.Mussared@utas.edu.au

Professor George Zdenkowski
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You may wish to retain this Information Sheet for your records.

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<p>Faculty of Law</p>



PARTICIPANT CONSENT FORM: INTERVIEW – FAMILY LAW DUTY LAWYER – LEGAL AID COMMISSION OF TASMANIA

SELF-REPRESENTED LITIGANTS: THE IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

1. I agree to take part in the research study named above.
2. I have read and understood the Information Sheet for this study.
3. The nature and possible effects of the study have been explained to me.
4. I understand that the study involves an interview where I will give my views and opinions on the impact the intervention of the duty lawyer has had on the different participants in the family law system and whether there was any benefit to those participants. I understand the interview will be recorded by iPod and that I will be able to review a copy of the transcript and make any amendments prior to publication on or about March 2017.
5. The interview will take place in my chambers at a time scheduled by me and at my convenience. There are no foreseeable risks involved in this process.
6. I understand that all research data will be securely stored on the researcher's password protected University server and that all copies of signed Consent Forms and transcripts will be kept separately, in a locked filing cabinet in the researcher's room at the university. The recorded interviews and transcripts will be retained for five years following the submission of the researcher's thesis and will then be destroyed.
7. Any questions that I have asked have been answered to my satisfaction.
8. I understand that the researcher will maintain confidentiality and that any information I supply to the researcher will be used only for the purposes of the research.
9. I understand that the results of the study will be published and that I cannot be identified as a participant.
10. I understand that my participation is voluntary and that I may withdraw at any time without any effect.

Participant's name: _____
Participant's signature: _____
Date: _____

Statement by Investigator

The participant has received the Information Sheet where my details have been provided so the participant has had the opportunity to contact me prior to consenting to participate in this project.

Investigator's name: _____
Investigator's signature: _____
Date: _____

INTERVIEW QUESTIONS FOR DUTY LAWYERS

Location in which you practise:

- a) Burnie
- b) Devonport
- c) Hobart
- d) Launceston

In which court do you mainly appear?

- (a) Family Court
- (b) Federal Circuit Court
- (c) Both

1. How many years of practice did you have as a family lawyer before being appointed as a Duty Lawyer?
2. Did you receive any training specific to the role of the Duty Lawyer before taking up the appointment? If 'Yes', please state what training. If 'No' – what type of training would have helped you
3. What guidance have you used to shape your practise as a Duty Lawyer?
(The Protocol/Other Duty Lawyers/Your experience/Guidance from the judiciary/Colleagues)
4. Do you do any other work than Duty Lawyer?
If the answer is 'Yes', how does this affect your work as the Duty Lawyer?
5. At what stage of the proceedings do you think the Duty Lawyer should become involved and would be more effective?
6. Do you think more needs to be done to raise SRLs awareness about the Scheme and what the duty lawyer does?
7. What practical difference (whether positive or negative) does the intervention of the duty lawyer make for SRLs?
8. What do you see as the primary purpose of your role?
9. What benefits do you think the duty lawyer service provides to SRLs?
10. What matters do SRLs actually ask you to assist them with?
11. In which proceedings or which SRLs do you give priority?
12. What type of assistance do MOST SRLs ask you to provide?
13. What do you think is the impact of the duty lawyer on:
 - (a) SRLs
 - (b) Judges
 - (c) Court staff
 - (d) Lawyer for the other party
 - (e) Independent Children's Lawyer
14. What is the best/worst thing about being a Duty Lawyer?
15. In your opinion, how can the Family Law Duty Lawyer Scheme be improved?

Appendix D

Document Pack - Stakeholders

Letter of Invitation to Stakeholders, Information Sheet and Stakeholder Survey Questions



LETTER OF INVITATION: COURT STAFF OF THE FAMILY COURT OF AUSTRALIA AND THE FEDERAL CIRCUIT COURT OF AUSTRALIA AND FAMILY LAW PRACTITIONERS

PHD STUDY: SELF-REPRESENTED LITIGANTS: IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

I am a Family Court Duty Lawyer working for the Legal Aid Commission of Tasmania. I am also a current full-time PhD candidate at the University of Tasmania. My thesis seeks to investigate the impact of the Family Court Duty Lawyer Scheme (the 'Scheme') since its introduction in March 2005. I attach a copy of the Information Sheet explaining my research.

I am writing to ask you to **participate in an online survey** to provide your personal views and experiences on the issue of self-represented litigants (SRLs). I am attaching an Information Sheet which explains my research in greater detail. It also outlines the security arrangements in relation to any responses I receive.

You will be asked to complete questions through the online survey site, SurveyMonkey. I would be grateful if you could respond to the survey within fourteen (14) days.

This thesis will extend the research conducted previously by examining the impact of the Family Law Duty Lawyer Scheme on SRLs from the perspective of key participants in the Family Court system such as the judiciary, court staff who deal with SRLs, Duty Lawyers who appear for SRLs and family law practitioners who represent clients who have had to deal with SRLs on the other side. I will also survey SRLs to hear their views on their interaction with the Family Court system.

It is an important component of this thesis that the widest possible range of people who have contact with self-represented litigants present their views and, importantly, that self-represented litigants themselves have an opportunity to comment on their experience with the Family Courts. The data from the interviews and the surveys will provide a detailed and original information base which will greatly enrich the analysis of the key issues addressed in the thesis.

Your responses, and the responses of the other interviewees, will be included in my thesis. I may also refer to your responses in one or more articles to be submitted for publication in journals, and in presentations at conferences.

This study has received ethical approval from the Human Research Ethics Committee (Tasmania) Network which is constituted under the National Health & Medical Research Council. Any concerns of an ethical nature or complaints about the manner in which the study is

conducted may be directed to the Ethics Executive Officer at human.ethics@utas.edu.au or telephone (03) 6226 7479. Please refer to Ethics Reference Number H13028.

The study has also been approved by the Ethics and Research Committees of the Family Court of Australia and Research and Ethics Sub-Committee of the Federal Circuit Court of Australia.

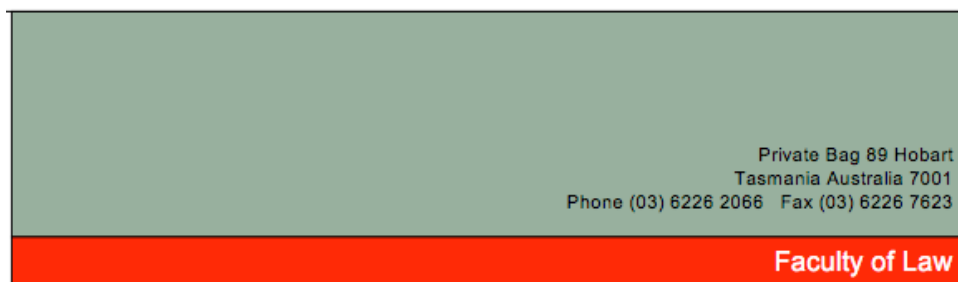
Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Honorary Professor George Zdenkowski. Our contact details are provided below.

I very much hope you will be able to assist with my research.

Yours sincerely,

Kiki Mussared
BA (Hons) LLB (Hons) GradCertLegalPrac
PhD Candidate
Faculty of Law
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Ph: (02) 6226 2066
Kiki.Mussared@utas.edu.au

Professor George Zdenkowski
Faculty of Law
University of Tasmania
george.zdenkowski@gmail.com



PARTICIPANT INFORMATION SHEET: COURT STAFF OF THE FAMILY COURT OF AUSTRALIA AND THE FEDERAL CIRCUIT COURT OF AUSTRALIA AND FAMILY LAW PRACTITIONERS

PHD STUDY: SELF-REPRESENTED LITIGANTS: IMPACT OF THE FAMILY LAW DUTY LAWYER SCHEME IN TASMANIA

Invitation

Your participation is invited to complete an **online survey** through SurveyMonkey to assist in research which seeks to investigate the impact on self-represented litigants (SRLs) appearing in the Family Court of Australia and the Federal Circuit Court of Australia of the Family Law Duty Lawyer Scheme (the 'Scheme').

I am a full-time PhD student in the Faculty of Law, University of Tasmania under the supervision of Honorary Professor George Zdenkowski and Dr Olivia Rundle. I am also working part-time as the Family Law Duty Lawyer with the Legal Aid Commission of Tasmania.

This will be an original study and provide important insights into the operation of the Scheme since its commencement in 2005 and how the family law system may benefit as a result of any reforms which may be recommended in this study.

What is the purpose of this study?

The study aims to increase awareness of the duty lawyer service and look at all aspects of how a duty lawyer can help people involved in the family law system and, if appropriate, make recommendations on how to improve the delivery of the duty lawyer service.

The key aims of this study are:

- To assess how the Family Law Duty Lawyer Scheme provides access to justice for self-represented litigants;
- To identify the purpose and nature of the duty lawyer role from the perspective of the key participants;
- To explore the impact of the Scheme on self-represented litigants and other key participants in the family law system;
- To identify appropriate reforms for the Scheme to better deliver the duty lawyer service.

What is the scope of this study?

This will be a quantitative and qualitative study as follows:

- A survey of self-represented litigants will be conducted by legal practitioners of the Legal Aid Commission of Tasmania and the Hobart Community Legal Service during the clinic legal advice sessions;
- Interviews will be conducted with judicial officers of the Family Court of Australia (FCA) and the Federal Circuit Court of Australia (FCC) in Tasmania;
- Interviews will be conducted with the duty lawyers working with the Legal Aid Commission of Tasmania;

- An online survey will be sent out to court staff of the combined registry of the FCA and FCC in Hobart and Launceston and all legal practitioners who are members of the Family Law Practitioners' Association of Tasmania;

Following analysis of the data from this study, recommendations may be made in relation to improving the delivery of the duty lawyer service.

Why have I been invited to participate?

Given that you are often the first or earliest point of contact for SRLs, the researcher considers your views and comments would provide an invaluable source of information for the study. In particular, if there have been situations where you can draw comparisons where a Duty Lawyer was or was not involved; please give examples in the 'Comment' box.

Please note that your involvement in this survey is voluntary. There are no consequences if you do not participate.

What will I be asked to do?

You will be asked to complete a number of questions through the online survey site, SurveyMonkey.

The survey is being sent to you in your professional capacity at your respective court and Registry and as a member of the Family Law Practitioners Association of Tasmania. You are asked to respond to the survey within fourteen (14) days

To participate, please click the link provided in the attached email.

Should you decide to complete the online survey, your participation will be taken as you having provided implied consent.

Are there any possible benefits from participation in this study?

Benefits to Participants:

- to be part of an original study which obtains the views of key and significant participants in the family law system;
- to be able to freely and honestly express those views about the issues confronted by, and the impact of, SRLs in the family courts;
- to comment on the difference to the process and/or the outcome of a matter involving SRLs when a duty lawyer is involved; and
- to have those views put forward anonymously but with sufficient coverage of the key participants to be able to assure the participants that their contribution will form the basis for the first major study on this topic.

Benefits to the Wider Community:

- to present the views of the key participants in the family law system which identify the issues, concerns and difficulties when an SRL is involved in the legal process and to identify where, when and how the duty lawyer may be able to interact with the legal system and SRLs to ensure a better outcome for all involved;
- to identify possible areas of reform to the Family Law Duty Lawyer Scheme to better meet the needs of the family law system; and
- to promote the use of the Family Law Duty Lawyer Scheme by encouraging greater interaction between the judiciary, court staff and personnel, legal practitioners and SRLs with the duty lawyer.

It is anticipated that the results from the interviews and surveys may enhance the efficiency and effectiveness of courts dealing with people who appear self-represented in family law matters.

Are there any possible risks from participation in this study?

I do not consider that there are any possible risks to you from your participation in this study, apart from the inconvenience of you devoting time to the interview.

Please be assured that your contribution is anonymous. Your identity cannot be determined through your participation or responses. The only identifying characteristic to be published is the fact that you are a current duty lawyer employed by the Legal Aid Commission of Tasmania.

What will happen to the information when this study is over?

The online surveys will be held by SurveyMonkey anonymously with no link to the identity of the participants. The data received by the researcher from SurveyMonkey will be security coded and stored on a University of Tasmania secure server and protected by a private password in a locked room. Data will be kept on the University secure server for a period of five (5) years after publication (due in March 2016), as required under the National Statement on Ethical Conduct in Human Research. After the expiration of the five year period, the data will be destroyed.

How will the results of the study be published?

The results will be published as part of a PhD thesis by March 2017. Participants will not be identifiable in the publication of the results.

Please also note that this study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on (03) 6226 7479 or email human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number H13028.

The study has also been approved by the Ethics and Research Committee of the Family Court of Australia and the Research and Ethics Sub-Committee of the Federal Circuit Court of Australia.

Should you have any queries about this study, please do not hesitate to contact me or my Primary Supervisor, Honorary Professor George Zdenkowski. Our contact details are provided below.

I hope you will participate in this study.

Yours sincerely,

Kiki Mussared
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You may wish to retain this Information Sheet for your records.

STAKEHOLDER SURVEY

SURVEY QUESTIONS FOR STAKEHOLDERS

Thank you for taking part in this survey. Your opinion is really important to me and will help me build better data for my research into the Impact of the Family Law Duty Lawyer Scheme on Self-Represented Litigants.

Your participation is voluntary and your contribution is anonymous. Your identity cannot be determined through your participation or responses. Should you decide to complete the survey, your participation will be taken as your having provided implied consent. Please read the attached Participants' Information Sheet if you require any further details about my study.

The survey should take no more than 10 minutes.

With thanks,

Kiki Mussared

*** 1. Please enter the date you completed this survey.**

DD MM YYYY
Date / /

*** 2. What is your role?**

- ☐ Judge of the Family Court of Australia
- ☐ Judge of the Family Court of Western Australia
- ☐ Judge of the Federal Circuit Court of Australia (Family Law jurisdiction)
- ☐ Registrar
- ☐ Family Consultant
- ☐ Judge's Associate
- ☐ Registry staff
- ☐ Family law practitioner
- ☐ Independent Children's Lawyer
- ☐ Other

Please comment

*** 3. Did you know that there is a Duty Lawyer available to help Self-Represented Litigants (SRLs) in Family Law matters?**

- ☐ Yes
☐ No

*** 4. From your observations or experience, do you think it is made clear to SRLs that there is a Duty Lawyer available to help them?**

- ☐ Yes
☐ No

5. If the answer to the previous question was "Yes", from your observations, is it because:

Select as many as apply.

- ☐ There is signage at the Registry
☐ There are brochures about the Duty Lawyer at the Registry
☐ There are brochures about the Duty Lawyer attached to all court forms
☐ There are references to the Duty Lawyer on all court websites
☐ There are references to the Duty Lawyer on all Legal Aid websites
☐ The Duty Lawyer announces BEFORE each court sitting that he/she is available to assist
☐ The Judge always asks SRLs if they would like the Duty Lawyer to assist
☐ Court officer announces BEFORE each court sitting that a Duty Lawyer is available to assist
☐ The Duty Lawyer wears identification
☐ Other

Please comment

6. If the answer to the previous question was "No", please state why.

Select as many as apply.

- ☐ No signage at the Registry
☐ No brochures about the Duty Lawyer at the Registry
☐ No brochures about the Duty Lawyer attached to all court forms
☐ No reference to the Duty Lawyer on all court websites
☐ No reference to the Duty Lawyer on Legal Aid websites

- ☐ No announcement made by the Duty Lawyer BEFORE each court sitting that he/she is available to assist
- ☐ The Judge does not always ask SRLs if they would like the Duty Lawyer to assist
- ☐ No announcement made by court staff BEFORE a court sitting that a Duty Lawyer is available to assist
- ☐ The Duty Lawyer does not always wear identification
- ☐ Other

Please comment

***7. How do you think the Duty Lawyer service could be more effectively brought to the attention of SRLs?**

Select as many as apply.

- ☐ More signage at the Registry advising the time the Duty Lawyer is available and their location
- ☐ Brochure on the Duty Lawyer Scheme attached to all court documents
- ☐ References to the Duty Lawyer on all Court websites
- ☐ Information about the Duty Lawyer, their availability and contact details on all Legal Aid websites
- ☐ The Duty Lawyer announcing his/her presence BEFORE the commencement of each court sitting
- ☐ The Judge always asking SRLs if they would like the Duty Lawyer to assist
- ☐ Court staff announcing the presence of the Duty Lawyer BEFORE the commencement of each court sitting
- ☐ The Duty Lawyer wearing identification
- ☐ Other

Please comment

***8. Where do you think the Duty Lawyer should be located to make the service more visible?**

- ☐ At the court
- ☐ At Legal Aid
- ☐ No opinion
- ☐ Other

Please comment

***9. Have you ever referred SRLs to the Duty Lawyer?**

- ☐ Yes
☐ No

10. If you have referred SRLs, how many people have you referred in the last three months?

- ☐ 1-5
☐ 6-10
☐ 11-15
☐ 16-20
☐ 21+

***11. In what capacity have you referred SRLs to the Duty Lawyer?**

- ☐ Judge
☐ Registrar
☐ Family Consultant
☐ Registry staff
☐ Court staff
☐ Lawyer for the other party
☐ Independent Children's Lawyer

12. What do you see is the main purpose of the Duty Lawyer service?

	Very Important	Important	Neither important nor Unimportant	Of Little Importance	Not at all important
To represent and help people who do not have a lawyer and 'level' the playing field	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To ensure SRLs get a fair hearing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

	Very Important	Important	Neither important nor Unimportant	Of Little Importance	Not at all important
To help SRLs get access to justice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To help Judges control SRLs and save time	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To help the court system run more efficiently and effectively	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To give SRLs realistic advice about the merits of their matter	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To divert SRLs from the courts to other more appropriate services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To give priority to and represent vulnerable people	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
To help SRLs get the result they want	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

*** 13. What do you believe the the Duty Lawyer service is delivering?**

Please select as many as apply.

- ☐ Facilitating the efficient working of the family court system
- ☐ Providing access to justice for SRLs
- ☐ Promoting equity of access to the court
- ☐ Facilitating SRLs to get a fair hearing
- ☐ Providing SRLs with better options for settlement
- ☐ Easing the pressure on all those involved in the family court system

Please comment

14. In your opinion, what interventions by a Duty Lawyer would be most beneficial to SRLs?

	Very Important	Important	Neither Important nor Unimportant	Of Little Importance	Not at all Important
Providing legal advice about the merits of their case at an early stage	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Correctly filling out SRL's forms and framing Orders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Explaining court processes and procedures to SRLs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Referring SRLs to other services, if appropriate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assisting SRLs with negotiations with the other party's lawyer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assisting SRLs get a settlement as quickly as possible	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Representing SRLs in court	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please comment

***15. In your opinion, what interventions by a Duty Lawyer would be most beneficial to the court system?**

	Very Important	Important	Neither Important nor Unimportant	Of Little Importance	Not at all Important
Providing legal advice about the merits of an SRL's case at an early stage	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

	Very Important	Important	Neither Important nor Unimportant	Of Little Importance	Not at all Important
Correctly filling out SRL's forms and framing Orders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Explaining court processes and procedures to SRLs	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Referring SRLs to other services, if appropriate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assisting SRLs with negotiations with the other party's lawyer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Assisting SRLs get a settlement as quickly as possible	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Representing SRLs in court	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please comment

*** 16. In your opinion, at what stage of the process ought the Duty Lawyer be involved?**

Select as many as apply.

- ☐ Before commencement of proceedings, to give legal advice on the merits of an SRL's matter
- ☐ Before commencement of proceedings, to correctly fill out documents
- ☐ Before an SRL appears in court, to to explain rules and procedures
- ☐ At court proceedings, to represent SRLs
- ☐ On the day of an SRL's court event, to assist with negotiations (with other party's lawyer or ICL)
- ☐ After a successful mediation, to draw Consent Orders
- ☐ After court proceedings, to explain the outcome, Orders and obligations

Please comment

*** 17. From your observations or experience, when an SRL is in court, does the Judge ask the SRL if they want the assistance of the Duty Lawyer?**

- ☐ Always
- ☐ Nearly Always
- ☐ Some of the time
- ☐ Rarely
- ☐ Never
- ☐ Other

Please comment

*** 18. If an SRL appears in a matter in which you are involved, how often do you ask an SRL whether they need the assistance of the Duty Lawyer?**

- ☐ Always
- ☐ Nearly Always
- ☐ Some of the time
- ☐ Rarely
- ☐ Never
- ☐ Other

Please comment

19. If the answer to the previous question was "Rarely" or "Never" can you please say why?

Select as many as apply.

- ☐ I represent the other party and it is not my job to help SRLs
- ☐ I am the ICL and it is not my job to help SRLs
- ☐ There was no Duty Lawyer available on that day
- ☐ I expect the Duty Lawyer to volunteer rather than I ask them to help
- ☐ I was aware that the Duty Lawyer was busy
- ☐ I assume that the SRL has decided to appear unrepresented
- ☐ Other

Please comment

***20. From your observations or experience, how often does the Judge ask the Independent Children's Lawyer to assist an SRL?**

- ☐ Always
- ☐ Nearly Always
- ☐ Some of the time
- ☐ Rarely
- ☐ Never
- ☐ Other

Please comment

***21. From your observations and experience, how often does the Independent Children's Lawyer decline the Judge's request to assist an SRL?**

- ☐ Always
- ☐ Usually
- ☐ Sometimes
- ☐ Never
- ☐ Don't know

Please comment

***22. From your observations or experience, how often is the Duty Lawyer proactive and helps SRLs before waiting to be asked?**

- ☐ Always
- ☐ Nearly Always
- ☐ Some of the time
- ☐ Rarely
- ☐ Never
- ☐ Other

Please comment

***23. From your observations or experience, when a Duty Lawyer helps an SRL, what practical difference (whether positive or negative) has the intervention of the Duty Lawyer made?**

	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
Documents were filled out correctly	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Matter took less time in court	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Representing the SRL in court relieved them of stress	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Alleviated stress on all others involved in the matter	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Negotiations with the other party's lawyer's proceeded better	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Negotiations with the other party's lawyer resulted in a settlement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Enabled the SRL to get better access to justice	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Upset or angered the SRL who felt they lost control of their case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Made no difference at all	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

***24. In your opinion, should a Duty Lawyer ALWAYS be available to assist when both parties are unrepresented and the Independent Children's Lawyer is the only legal professional?**

- ☐ Yes
- ☐ No
- ☐ No opinion

*** 28. How important to you is a good relationship with the Duty Lawyer?**

- ☐ Very Important
- ☐ Important
- ☐ Neither Important nor Unimportant
- ☐ Of Little Importance
- ☐ Not at all Important
- ☐ Other

Please comment

*** 29. In your opinion, what are the advantages of the Duty Lawyer service?**

Select as many as apply.

- ☐ It is free advice
- ☐ The Duty Lawyer can be more honest because there isn't an ongoing relationship
- ☐ The Duty Lawyer provides a 'reality check' at an early stage and deflects any inappropriate or flawed Applications
- ☐ The Duty Lawyer's assistance to correctly draft forms/Orders ensures smooth passage through the court system
- ☐ The Duty Lawyer provides a 'triage' service at an early stage to ensure SRLs are directed to appropriate options
- ☐ The Duty Lawyer assists SRLs get access to justice by providing advice and representation
- ☐ The Duty Lawyer's representation levels the playing field for SRLs in the adversarial system
- ☐ The Duty Lawyer's involvement assists in the efficient and effective running of the court system
- ☐ Other

Please comment

*** 30. In your opinion, what are the disadvantages/limitations of the Duty Lawyer service?**

Select as many as apply.

- ☐ There is never enough time for each SRL
- ☐ It is a 'once only' service delivery model
- ☐ There are not enough Duty Lawyers available
- ☐ The Duty Lawyer was inexperienced

- ☐ The Duty Lawyer was not competent
- ☐ The Duty Lawyer was not interested
- ☐ There is insufficient information about what the Duty Lawyer can and cannot do
- ☐ The advice and representation on one occasion does not 'level' the playing field for SRLs
- ☐ The Scheme is a flawed model offering the illusion of representation without substance
- ☐ Other

Please comment

31. In your opinion, how can the Family Law Duty Lawyer Scheme be improved?

***32. Would you be willing to participate in an interview, at your convenience, to provide additional comment?**

If the answer is "YES", please contact me at the email address provided below..

- ☐ Yes
- ☐ No

Next

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